(22,586.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 965.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THEODORE A. SCHUBERT.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Page
Caption	1
Transcript from the supreme court of the District of Columbia	1
Caption	1
Declaration	1
Notice to plead	4
First plea	4
Joinder of issue	4
Memorandum: Leave to file additional plea granted	4
Second plea	5
Demurrer to second plea	12
Memorandum: Demurrer to second plea sustained	13
Memorandum: Verdict for plaintiff	13
Motion for a new trial	13
Memorandum: New trial granted unless plaintiff remits $5,000 of verdict	13
Order to enter remittitur	14
Motion for a new trial overruled; judgment on verdict less remittitur ordered; judgment; appeal	14
Memorandum: Appeal bond approved and filed	14
Bill of exceptions submitted	14

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	Original.	Print
Bill of exceptions made part of record		15
Bill of exceptions		15
Testimony of Frank H. Bell		15
Herman J. Towney		16
Dyonisius J. Waters		18
Theodore A. Schubert		19
Edward M. Parker		22
W. P. Borland		24
Robert Farnham		26
Wm. F. Greene		27
E. B. Hunt		29
Application for membership in the relief fund		30
Regulations governing relief department		39
Exceptions to rulings of court		99
Plaintiff's prayers		100
Defendant's prayers		100
Charge to jury		101
Directions to clerk for preparation of transcript		103
Time to file transcript extended		103
Clerk's certificate		103
Minute entries of argument		105
Opinion		105
Judgment		107
Order allowing writ of error		107
Writ of error		108
Bond		108
Citation and service		109
Clerk's certificate		110

In the Court of Appeals of the District of Columbia.

No. 2222.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, Appellant,
vs.
THEODORE A. SCHUBERT.

a Supreme Court of the District of Columbia.

At Law. No. 51468.

THEODORE A. SCHUBERT, Plaintiff,
vs.
PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed March 8, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51468.

THEODORE A. SCHUBERT, Plaintiff,
vs.
PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY, a Corporation, Defendant.

The plaintiff, Theodore A. Schubert, sues the defendant, the Philadelphia, Baltimore & Washington Railroad Company, a corporation, for that heretofore, to-wit, on the 13th day of May, 1908, and prior thereto, the defendant was as it still is a common carrier by railroad in the District of Columbia, and as such in the operation and move-

ment of its trains, engines and cars used, owned and operated certain yards, tracks and switches situate in the City of Washington, District of Columbia, among which were certain tracks designated as side tracks No. 7, No. 8 and No. 9, which said side tracks were situate in one of its yards in the southwestern portion of said City, at or near a point where 12th street crosses the tracks used by the defendant: which said side tracks were so connected with the main tracks used by the defendant, by means of switches, that trains, engines and cars could be "switched" or shifted back and forth and to and from said main tracks and said side tracks No. 7, No. 8 and
2 No. 9; and on the day and year aforesaid the plaintiff was employed as a brakeman with one of the engines of the defendant known as No. 5109, which said engine was being used on the day and year aforesaid for the purpose of "switching" or shifting part of the train to which said engine was attached from the main track of the defendant to said track No. 7, it being necessary for any cars or train of cars in being shifted from the main track to said side track No. 7 to be run by and over the switches which connected said side tracks 8 and 9 with the said main track.

And the plaintiff avers that it then and there became and was the duty of the defendant, its agents and employees, to use due and proper care to cause no injury to the plaintiff while he was discharging his duties as brakeman as aforesaid, and to provide safe and proper switches and tracks, and to have said switches located in suitable and proper places, and to have the same properly equipped with all necessary and proper signals and appliances, so that the plaintiff while doing his work might be notified and warned as to the condition of the defendant's switches with respect to whether they were closed or opened; and to use due and proper care to cause its said switches to be properly set and adjusted so that no car or train of cars, upon which the plaintiff might be employed, would wrongfully be caused to run or pass through any of said switches into and upon any of said tracks which were blocked or occupied by any other cars or train of cars; and to use due and proper care not to issue any improper order or command to the plaintiff that would cause him to be upon or about any car or train of cars that would be
3 wrongfully run or caused to run through the wrong switch into and upon any of said side tracks which were blocked or occupied by any other cars or train of cars;

But in violation of its duties in the premises and in disregard of the rights and safety of the plaintiff, the defendant, its agents and employees, did negligently and carelessly fail to maintain and have its tracks and switches, particularly the switch which opened and closed said side track No. 8, in a safe and proper condition, and did negligently and carelessly fail to have said switch located in a suitable and proper place, and did negligently and carelessly fail to equip said switch with the necessary signal or signal lights to enable the plaintiff when upon a car or train of cars approaching said switch to determine whether the same was open or closed; and did negligently and carelessly cause said switch which opened and closed said side track No 8 to be located in an unsuitable and improper place, to-wit,

under the bridge by means of which Twelfth Street crosses over and above the defendant's yards and tracks, in which place, owing to said bridge and the shadow thrown thereby, the said switch which opened and closed said side track No. 8 is and was obscured and hidden from the view or vision of anyone approaching the same upon any moving car or train of cars; and while said side track No. 8 was occupied or blocked by other cars or train of cars did negligently cause said switch to be left open so that any car or train of cars being shifted from the said main track and intended for said side track No. 7 would be wrongfully caused to be run into and
4 upon said side track No. 8; and did negligently and carelessly, through its agent and employee the conductor in charge of the engine aforesaid, under whom the plaintiff was employed, and to whose orders he was subject, order and direct the plaintiff to ride upon four cars which were intended to be separated from the train aforesaid, and to be run or "kicked" into and upon said side track No. 7, in order that the plaintiff might be in a position to control and stop the said four cars by means of the brakes attached thereto at the proper position on said side track No. 7 after the said cars had passed or been kicked through the switch leading into said side track No. 7:

So that in consequence of the negligence and carelessness of the defendant, its agents and employees as aforesaid, while the plaintiff was carrying out the orders of said conductor, and riding upon the said four cars which had been separated from the train aforesaid and were being run or "kicked" from the main track of the defendant as aforesaid, the said four cars instead of running into and upon the said side track No. 7, where they were intended to be and should have been run, were negligently and wrongfully caused as aforesaid to run into and upon the said side track No. 8, where they were brought and came into violent collision with the cars or train of cars standing upon said side track No. 8 as aforesaid; as a result whereof and through the negligence and carelessness of the defendant, its agents and employees as aforesaid, and without any negligence or carelessness on his part, the plaintiff was thrown from the place where he was riding upon the said four cars as aforesaid, to and upon the track of the defendant company, and before he
5 could extricate and remove himself therefrom the said train from which the said four cars had been disconnected and "kicked" as aforesaid, and which train was at the time negligently being run backward and following too close to the said four cars at a decreased rate of speed, ran over the plaintiff and bruised, mangled and crushed him, and inflicted upon him many serious and permanent injuries; and thereby he received many cuts, bruises, contusions and lacerations about his head, arms and body, and had his right shoulder and arm crushed and mangled and had the muscles of said arm from the shoulder to the elbow-joint stripped and torn from his arm, whereby his arm was rendered permanently helpless and useless, and he was thereby otherwise greatly shocked and injured and had his nervous system so greatly injured that his power of both mind and body has been seriously and permanently impaired.

and he has been made sick, sore and lame and has so remained from the day and year aforesaid hitherto and always will so remain, and he has suffered and will continue to suffer great pain and anguish of body and mind, and he has been and still is and will continue to be during the balance of his life unable to perform any labor which requires the use of his right arm, and he has lost large sums of money which he would otherwise have earned and his earning capacity has been greatly and permanently impaired and reduced, and he has been compelled to pay out and expend large sums of money in endeavoring to be healed and cured of the injuries received as aforesaid; all to his great damage in the sum of Twenty-five Thousand (25,006) Dollars.

Wherefore, he brings this suit and claims damages in the
6 sum of Twenty-five Thousand (25,000) Dollars besides costs.

LECKIE, FULTON & COX,
O'FLAHERTY & FULTON,
Attorneys for Plaintiff.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

LECKIE, FULTON & COX,
O'FLAHERTY & FULTON,
Attorneys for Plaintiff.

First Plea.

Filed March 29, 1909.

* * * * * * *

Now comes the defendant and for plea to the declaration filed by the plaintiff in the above entitled cause says that it is not guilty as therein alleged.

McKENNEY & FLANNERY,
Attorneys for Defendant.

7 *Joinder of Issue.*

Filed March 31, 1909.

* * * * * * *

The plaintiff joins issue in the plea of the defendant filed in the above entitled cause.

LECKIE, FULTON & COX,
Attorneys for Plaintiff.

Memorandum.

May 23, 1910.—Leave to five additional plea granted.

Second Plea.

Filed May 23, 1910.

* * * * * * *

And now comes the defendant, the Philadelphia, Baltimore & Washington Railroad Company, by leave of the Court first had and obtained, and for a further and second plea to the declaration filed by the plaintiff in the above entitled cause and as a defense to this action, says:

That the said plaintiff, Theodore A. Schubert, before the institution of this suit and before the injuries alleged in his declaration to have been received by him on May 13, 1908, were so received,
8 applied for membership in and was received as a member of the Relief Fund of said defendant Railroad Company, and by and in his application for and contract of membership therein, which was dated on, to-wit, October 18th, A. D. 1905, and duly signed by him, and which is now shown to the Court as a part of this plea, among other things contracted, agreed and stipulated as follows:

Philadelphia, Baltimore & Washington Railroad Company.

Relief Department.

Application for Membership in the Relief Fund.

To the Superintendent of the Relief Department:

I, Theodore Albert Schubert of Washington, D. C., employed in the service of the Philadelphia, Baltimore & Washington Railroad Company, as Brakeman upon the Maryland Div. C. T. Department, do hereby by reason of such employment, apply for membership in the Relief Fund, and consent and agree to be bound by the Regulations of the Relief Department of the said Company, as contained in the book of said Regulations, approved by the Board of Directors, which I have read or have had read to me, and by any other regulations of the said Department hereafter adopted, and by the provisions of any agreement or agreements made by the said Company with any other corporation or corporations associating in administration of their respective Relief Departments, in accordance with said book of Regulations.

I also agree, That the said Company, by its proper agents, and in the manner provided in said Regulations, shall apply as
9 a voluntary contribution from any wages earned by me under said employment, or from benefits that may hereafter become payable to me, at the rate of two dollars and ten cents per month for the purpose of securing the benefits provided for in the Regulations for a member of the Relief Fund of the second class, [a] and additional death benefit equal to twice the death benefit of the first class. [a] Unless I shall otherwise designate in writing, with the ap-

proval of the Superintendent of the Relief Department, death benefit shall be payable to [a] my father Mannassas D. Schubert, Experiment, Amherst Co., Va.—And if any person now or hereafter designated by me to receive the death benefit shall not be living or shall be incapacitated for executing the requisite receipt and release, or if there shall be no such person, the death benefit shall be payable as provided in the Regulations of the Relief Department for such event. And I agree that the acceptance of benefits from the said Relief Fund for injury or death shall operate as a release of all claims for damages against said Company, arising from such injury or death, which could be made by or through me, and that I or my legal representatives will execute such further instrument as may be necessary formally to evidence such acquittance.

I also agree, that this application, when approved by the Superintendent of the Relief Department, shall make me a member of the Relief Fund on and from the date upon which by the provisions of the Regulations and the terms of this application, it
10 takes effect, and shall constitute a contract between myself and the said Company, and that the terms of this application and the Regulations of said Department shall, during my membership, be a part of the conditions of my employment by the Company, and that the same shall not be avoided by any change in the character of my service, or locality where rendered, while in such employment, nor by any change in the amounts applicable from my wages to the Relief Fund, which I may hereafter consent to, and that the agreement that the above-named amounts shall be appropriated from my wages shall apply also to any other amounts arising from changes made as aforesaid and shall constitute an appropriation and assignment in advance, to the said Company in trust, for the purposes of the Relief Fund, of such portions of my wages, which assignment shall have precedence over any other assignment by me of my wages, or of any claim upon them on account of liabilities incurred by me.

I also agree, for myself, and those claiming through me, to be especially bound by Regulation numbered 65, providing for final and conclusive settlement of all disputes, by reference to the Superintendent of the Relief Department and an appeal from his decision to the Advisory Committee.

I certify, that I am correct and temperate in my habits; that so far as I am aware I have no injury or disease, constitutional or otherwise, which will tend to shorten my life, and am now in good health and able to earn a livelihood.

I also agree, That any untrue or fraudulent statement made by me to the Medical Examiner, or any concealment of facts
11 in this application, or resignation from the service of the said Company or my being relieved from employment and pay therein at the pleasure of the Company or its proper officers, shall forfeit my membership in the aforesaid Relief Fund and all benefits, rights or equities arising therefrom, excepting that my leaving the service shall not (in the absence of any of the other

foregoing causes of forfeiture) deprive me of any benefits to the payment of which I shall have previously become entitled by reason of accident or sickness occurring while in the service.

This application to take effect the eighteenth day of October, A. D. 1905, if I shall be on duty on that date; otherwise upon the date of my going on duty thereafter.

In witness whereof, I have signed these presents at Washington, D. C., this twenty-sixth day of October, A. D. 1905.

THEODORE ALBERT SCHUBERT.
Father assenting.

Witness:

The following made before execution:

P. H. Steltz jr. witness to "Mannassas" in signature of father corrected.

P. H. STELTZ, JR.

R. D. BARRETT,
Witness to
MANNASSAS D. SCHUBERT.

The foregoing application is approved at the office of the Superintendent of the Relief Department at Philadelphia, in the county of Philadelphia, State of Pennsylvania, this eighteenth day of December, A. D. 1905.

No. 247018.

E. B. HUNT,
Assistant Superintendent of the Relief Department.

LW1.

a. If no additional death benefit is taken in this application, draw lines through the words "and additional death benefit" and
12 all following, to and including the word "class" in the next line. If no beneficiary is specially designated draw lines through the blank space. These are not to be noted by the witness.

Record W Card T Statistics B Cert. issued 12/18/05 S. Dept. 688.
D. M.

Questions Answered by Applicant for Membership in Connection with Annexed Application.

1. What is your name in full, including all given names?	1. Theodore Albert Schubert.
2. When were you born?	2. Dec. 3rd 1884.
3. Where were you born?	3. Levy Co.—Florida.
4. Are your parents living? If so, give their names. If not living, give age at, and cause of death.	4. Father. Mannassas D. Schubert. Mother. Deceased—38 years—Unknown.
5. Are you married or have you been? If wife (or husband) living, give name.	5. No.

6. Have you any children living? If so, give names and ages. If none, so state. — 6. None.

7. What are the names of your brothers and sisters? (If married this question need not be answered.) — 7. Pearl V. — no brothers deceased. Edith I. Turner — no sisters deceased.

13

8. Have you been furnished with a copy of the book of regulations of the Pennsylvania Railroad Voluntary Relief Department? Yes. 9. Can you read print? Yes. 10. Have you read those regulations? Yes. 11. Have you had those regulations read to you? No. 12. Have you had a sunstroke? No. 13. Are you subject to fits? No. 14. Have you a stricture? No. 15. Have you hemorrhoids? No. 16. Have you a rupture? No. 17. Have you had articular rheumatism? No. 18. Have you had smallpox? No. 19. Have you been vaccinated? Yes. 20. Have you any other disease or physical infirmity? No. 21. Is there any disease you are likely to have inherited? No. 22. Do you know of any reason why you should not be accepted? No. 23. Have you ever been employed by any of the Companies associated in the administration of the Relief Department? If so, give name of Company, character and dates of employment with each Company, including the present service since Oct. 18th 1905 as Brakeman upon the Maryland Div. C. T. Dept.

I have read or have had read to me the above questions and the answers, and do hereby certify that the answers are true to the best of my knowledge and belief.

Signature of Applicant.

THEODORE ALBERT SCHUBERT.

Witness:

The following made before execution:

In answer to Question 7 name "Pearl B" corrected.

P. H. STELTZ, JR., *M. D.*

Oct. 26th 1905.

14 *Medical Examiner's Certificate.*

24. Intelligence. — 24. Average.
25. General development. — 25. Muscular.
26. Height. — 26. 5 feet 10¼ inches.
27. Weight. — 27. 157 lbs.
28. Chest measure. — 28. 36 in. (full insp.), 32 in., (full exp.)
29. Abdominal measure. — 29. 30 in.
30. Sex. — 30. Male.
31. Hair. — 31. Brown.
32. Complexion. — 32. Fair.
33. Eyes. — 33. Blue.
34. Special senses. — 34. Normal.

35. Head and face.	35. Normal.
36. Abdomen and groins.	36. Normal.
37. Spine and joints.	37. Normal.
38. General surface.	38. Normal.
39. Heart: *a.* Number and character of pulse beats.	39. *a.* 74—full & regular.
b. Where apex beats.	*b.* Normal.
c. Ausculation.	*c.* Normal.
d. Blood-vessels.	*d.* Normal.
40. Lungs: *a.* Number and character of respirations.	40. *a.* 18—easy—abdominal.
b. Percussion.	*b.* Resonant.
c. Auscultation.	*c.* Normal.
d. Character of respiratory murmur.	*d.* Vesicular.
41. Kidneys and bladder.	41. No evidence of disease.
42. Cachexiæ, diatheses, temperate, &c.	42. None, temperate.
43. Opinion as to applicant's statement after examination.	43. Truthful.
44. Opinion of applicant's chances for longevity.	44. Expectancy.
45. Vaccinated when examined.	45. No.

I certify that the above questions were answered advisedly as stated therein, by the person named as applicant in the annexed application, that the description and facts relating to the applicant are as ascertained from him, that I have carefully examined him, that the above is a correct sketch of his existing condition, according to my best knowledge and belief, and I do hereby approve said applicant as physically qualified.

P. H. STELTZ, JR., *M. D.*,
Medical Examiner.

Place and date of examination, Washington, D. C., Oct. 26th, 1905.

If applicant is not approved write "dis" before "approve" and "un" before "qualified." In other cases draw lines through the spaces.

The above certificate examined and applicant found physically qualified.

T. W. LATTA, *M. D.*,
Chief Medical Examiner.

Philadelphia, Pa., Nov. 3, 1905.

16 The aforesaid application, as is shown upon its face, was duly approved by the proper officer of The Pennsylvania R. R. Voluntary Relief Department, said Department being an association in joint administration of the Relief Departments or Funds of the Pennsylvania Railroad Company, the Northern Central Railway Company, the defendant the Philadelphia, Baltimore & Washington Railroad Company, and the West Jersey & Seashore Railroad Company, under proper authorizations of the several Boards of Directors of said Railroad Companies, and a certificate of membership in the Relief Fund of the defendant the Philadelphia, Baltimore & Washington Railroad Company, being No. 247018, dated October 18th, 1905, was duly issued to and accepted by said Theodore A. Schubert, said certificate being in the words and figures following, to-wit:

"The Pennsylvania Railroad Voluntary Relief Department.

Certificate of Membership in the Relief Fund.

No. 247018.

OFFICE OF THE SUPERINTENDENT,
PHILADELPHIA, PA., *Oct.* 18, 1905.

This certifies that Theodore A. Schubert employed by The Philadelphia, Baltimore & Washington Railroad Company is a member of the Relief Fund of that Company, and is entitled to the Benefits provided by the Regulations of the Relief Department for a member of the second class, with two additional Death Benefits of the first class.

E. B. HUNT,
Assistant Superintendent of the Relief Department.

17 Said certificate and the regulations then in force, which had been duly adopted by said Relief Department and which are referred to and form a part of said certificate, and said application for and contract of membership, are now shown to the Court as a part of this plea.

By virtue of said application and contract, said certificate of membership and said regulations forming a part thereof, the plaintiff became a member of the Relief Fund of the defendant company of the second class entitled to two additional death benefits and made a monthly contribution to said Fund of $2.10 from said 18th day of October, 1905 to May 13, 1908, the date of the accident set forth in his declaration. As a member of said Relief Fund of the second class said plaintiff was entitled to receive disablement benefits for each day, including Sundays and holidays, as follows: In the event of accident, for the first 52 weeks, at the rate of $1.00 per day; after 52 weeks, at the rate of .50 per day; in case of sickness, after the first three days and not longer than 52 weeks, .80 per day, and after 52 weeks, .40 per day. And in addition to said disablement benefits his beneficiary, in the event of the plaintiff's death, would

have been entitled to receive $500.00 and $250.00 for each of the two additional death benefits, or, in all, $1,000.00. The plaintiff's membership in and payment to the Relief Fund also entitled him to participation in the Pension or Superannuation Fund of said defendant Company, from which Fund allowances are paid to members retired from the service based on length of membership and class held therein by the member as fully set forth in the
18 aforesaid Regulations, and in addition to this the plaintiff was entitled to surgical attendance and hospital service free of charge when disabled by accident in the service of the Company, and to an artificial limb or other appliance made necessary by accident in such service.

The Relief Fund from which said benefits are and were to be paid was formed by *voluntary* contributions from the employees of the defendant Company and the other Companies above named, jointly associated in its management, appropriations whenever necessary to make up any deficit by said Company, the income or profit derived from investments of the moneys of the Fund and such gifts or legacies as might be made to the said Companies for the use of the Fund. Said Companies, including this defendant, took general charge of the Department, guaranteed the fulfilment of its obligations in conformity with regulations from time to time established, took charge of its funds, became responsible for their safe keeping, supplied the necessary facilities for conducting the business of the Relief Department, and paid all the operating expenses thereof.

On December 31, 1908, the total number of employees of the defendant the Philadelphia, Baltimore & Washington Railroad Company was 8458, of which but 6909 were members of the Relief Fund, and during said year 1908, in which plaintiff sustained his injuries, said Railroad Company contributed, as the cost of administering its Relief Fund, the sum of $21,557.02, and during the time the plaintiff was a member of said Fund its total contribution for such administration was $57,610.51. In addition to the fore-
19 going, said Company furnished for the use of the Relief Department the facilities of its mail, express and telegraph departments free of charge.

Under Section 58 of the aforesaid Regulations it was provided as follows:

"Should a member or his legal representative make claim, or bring suit, against the Company, or against any other corporation which may be at the time associated therewith in administration of the Relief Departments, in accordance with the terms set forth in Regulation No. 6, for damages on account of injury or death of such member, payment of benefits from the Relief Fund on account of the same, shall not be made, until such claim shall be withdrawn or suit discontinued. Any compromise of such claim or suit, or judgment in such suit, shall preclude any claim upon the Relief Fund for benefits on account of such injury or death, and the acceptance of benefits from the Relief Fund by a member or his beneficiary or beneficiaries, on account of injury or death, shall operate as a release and satisfaction of all claims against the Company and

any and all of the corporations associated therewith in the administration of their Relief Departments, for damages arising from such injury or death."

That after the plaintiff received the injuries alleged and set forth in the declaration in this case and when, under his said application and contract of membership in the Relief Fund and the Regulations forming a part thereof, he had the right and privilege to elect between the acceptance of the benefits provided for by and under his said application and contract and said regulations and the bringing of a suit against the defendant Company for damages for said injuries, he, the plaintiff, voluntarily, freely and without any solicitation or compulsion on the part of the defendant, accepted the benefits payable to him under his said application and contract of membership and said regulations and duly receipted in writing therefor as follows:

On June 12, 1908, $18.00 for benefits for 18 days from May 14-31, 1908, inclusive; on July 10, 1908, $30.00 for benefits for 30 days from June 1-30, 1908, inclusive; on August 7, 1908, $31.00 for benefits for 31 days from July 1-31, 1908, inclusive.

That after said payments were made the plaintiff having presented a claim to and made a demand upon the defendant for damages for the injuries alleged to have been sustained by him in said accident, no further payments were made to him from said Relief Fund as provided in Section 58 aforesaid.

And this defendant says that said payments of benefits so made to said plaintiff and voluntarily accepted and received by him subsequent to the date of his alleged injury and prior to the institution of this suit under his aforesaid application and contract of membership in said Fund and the regulations forming part thereof, operated as a release of all claims for damages against this defendant arising from the injury which the plaintiff claims to have sustained, and the defendant says that by reason thereof the plaintiff herein is barred from recovering any sum whatsoever in this action against the defendant and that the defendant has been fully discharged and released from all the claims and demands set forth in the declaration in this cause.

McKENNEY & FLANNERY,
Attorneys for the Defendant.

Demurrer to Second Plea.

Filed May 23, 1910.

* * * * * * *

The plaintiff demurs to the second plea of the defendant filed in the above entitled cause, and says that the said plea is bad in substance.

LECKIE, FULTON & COX,
M. J. FULTON,
Attorneys for Plaintiff.

Note.

One of the matters of law intended to be argued at the hearing is that under the provisions of law enacted by the Congress of the United States known as the Employers' Liability Law, as amended, the facts alleged in such plea constitute no defense to the plaintiff's cause of action.

Memoranda.

May 24, 1910.—Demurrer to Second Plea sustained.
22 May 25, 1910.—Verdict for Plaintiff for $12,500.00.

Motion for a New Trial.

Filed May 26, 1910.

* * * * * * *

And now comes the defendant and moves the Court to set aside the verdict rendered by the jury in the above entitled cause on May 25, 1910, and to grant a new trial, and for reasons therefor assigns the following, to wit:

1. Because of errors of law committed by the Court in the trial of said cause.
2. Because the damages awarded by the jury are excessive.
3. Because the verdict was the result of prejudice existing in the minds of the jury.
4. Because said verdict is contrary to law and to the instructions of the court.

McKENNEY & FLANNERY,
Attorneys for Defendant.

MAY 26, 1910.

Messrs. Leckie, Fulton & Cox, Attorneys for Plaintiff:

Please take notice that we shall call the foregoing motion for a new trial to the attention of Chief Justice Clabaugh, holding Circuit Court No. 2, on Friday, June third, at the opening of
23 Court on that day, or as soon thereafter as counsel can be heard.

McKENNEY & FLANNERY,
Attorneys for Defendant.

Memorandum.

June 3, 1910.—New trial granted unless plaintiff remits $5,000.00 of verdict in 15 days.

Order to Enter Remittitur.

Filed June 11, 1910.

* * * * * * *

The Clerk of the Court will please enter upon the docket a remittitur of $5000.00 from the verdict of the jury in favor of the plaintiff, rendered in the above entitled cause.

LECKIE, FULTON & COX,
O'FLAHERTY & FULTON,
Attorneys for Plaintiff.

24 Supreme Court of the District of Columbia.

MONDAY, *June 13th*, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

It appearing that the plaintiff herein has by his attorneys of record filed a remittitur of Five Thousand Dollars of the verdict of Twelve Thousand Five Hundred Dollars rendered herein it is ordered that the motion for a new trial filed herein be, and the same is hereby overruled and judgment on verdict less the said remittitur is ordered. Wherefore, it is considered that the plaintiff herein recover of defendant herein, the sum of Seven Thousand Five Hundred Dollars ($7500.00) with interest thereon from this date, together with costs of suit to be taxed by the clerk and have execution thereof.

From the foregoing judgment, the defendant by its attorney, in open court, notes an appeal to the Court of Appeals of the District of Columbia; whereupon, the penalty of a bond to operate as a supersedeas is hereby fixed in the sum of Ten Thousand Dollars.

Memoranda.

June 23, 1910.—Appeal bond approved and filed.
25 July 11, 1910.—Bill of exceptions submitted.

Supreme Court of the District of Columbia.

WEDNESDAY, *July 13th*, 1910.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice, presiding.

* * * * * * *

The Court having this day signed the Bill of Exceptions heretofore, submitted herein, now orders the same of record as of the time of the noting thereof at the trial.

Bill of Exceptions.

Filed July 13, 1910.

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Be it remembered that the above entitled cause came on for trial before Chief Justice Clabaugh and a jury on May 24, 1910; Messrs. M. J. Fulton and Joseph W. Cox appearing on behalf of plaintiff and Mr. J. S. Flannery representing the defendant.

And thereupon the plaintiff to maintain the issues upon his part joined gave evidence by the witnesses hereinafter named tending to prove as follows:

FRANK H. BELL, a witness called by and on behalf of the
26 plaintiff, testified that on May 13, 1908, he was employed by the defendant, the Philadelphia, Baltimore and Washington Railroad Company, as engineer of engine 5109, the engine of the train upon which the plaintiff was at the time he was injured; that Lusby was the conductor of this train, Towney was flagman, Waters was front brakeman; the plaintiff Schubert was rear brakeman, and Crandall fireman; that as nearly as he could recollect, the accident occurred between eleven and twelve o'clock at night; that they were engaged in a shifting operation in the railroad yard near 12th Street; that the conductor gave them a signal to pull 15 or 18 cars off of No. 9 track through what is called the "ladder" track, with which all the yard sidetracks connect, onto the main track; the conductor then gave a "stop" signal, and then gave a signal to "kick" or back the cars back towards switches 8 and 9; that he then got a shut-off or stop signal from one of the men on the ground 15 or 16 car lengths away, and about the time he received this latter signal he collided with the cars on the opposite end; that he then received a signal to go ahead and back up into No. 9 switch; that when he reached No. 9 switch he heard that Schubert was hurt, saw that a cut on his arm was bleeding, grabbed a white flag, tore it up and bound it around his arm close to the shoulder, after which Schubert was taken to South Capitol Street.

Said witness further testified on direct examination that that night his train consisted of 15 or 16 cars; that if they had intended to cut
off four cars from the rear and put them in sidetracks No.
27 7 or No. 5, it would have been necessary to pass by switches leading into sidetracks No. 9 and No. 8, and these switches should have been closed for the movement; that the cars of his train ran into switch No. 8; that he did not know at that time whether this switch had any cars on it or not, that this was not his business; that all of the switches there had targets on them, with the exception of No. 8; that a target is a switch light signifying the position of the switch; that when it shows white it indicates that the switch is set for a straight track and when it shows green in the yard it signifies that the switch is set to turn off of the ladder track into the yard track; green and white are used in the yard and red and white light upon the main line switches; that a green light in the yard

means that the switch is open; that No. 8 switch is the only one directly under the 12th Street overhead bridge, indicated on the photographs; that No. 9 is north of the bridge and No. 7 south of the bridge; that from his position on the engine, there being no target at No. 8 switch, it was impossible to tell whether it was open or shut, and that no one else, if he was on the cars, could tell whether it was open or closed.

On cross-examination said witness testified that the men on the ground could tell, if they got close enough to the switch; that this yard was opened quite a while before the accident happened; that the witness had run a yard engine in that neighborhood, in and out of that yard, for about two years; that he was running an extra engine on the road, and also a yard engine occasionally in the yard; that he could not tell exactly how much of the time plaintiff
28 Schubert was a member of his crew; that sometimes he would be in the crew and sometimes not; that he did not know why it was No. 8 switch did not have a target like the other switches, but that during all the time he was there after these yards were put into commission No. 8 track had no target on it.

HERMAN J. TOWNEY, a witness called by and on behalf of the plaintiff, testified that he was a brakeman in the employ of the defendant company and was a member of the crew of the train on which the plaintiff was hurt, May 13, 1908; the other brakemen were Schubert and Waters; that they were engaged in shifting cars in the yard; that he threw the switch to let the train out of No. 9 siding and after the train had passed the switch he threw it back; that he then gave the "back" signal to the engineer, because they were going to put four cars in switch No. 5; that at this time Schubert was on a Seaboard Air Line box car in the train, one of the cars which they were going to put in No. 5 switch; that he was up there to uncouple the cars; that Schubert got out of the car and was cutting the four cars off that were to go into No. 5 switch; that to reach this switch the train had to pass switch No. 8 and No. 9; that switch No. 8 ought to have been closed for the train to pass, but it was not closed, and as the result of it being open the cars went into No. 8; that at that time there were some cars on No. 8 switch between 3 and 4 car lengths from the mouth of the switch, and when the four cars entered that switch they ran against them; that as a result of this collision Schubert was hurt; that when the witness first saw him after the accident
29 Schubert was standing up against a car, and when they found he was injured he was taken to the hospital; that no particular one was attending to opening and shutting the switches; that he had closed switch No. 9 and some one else was going to open switch No. 5, but that he (witness) did not close switch No. 8; that he was back at the switches and Schubert was on the train; that he had to be on the cars to cut them; that when the witness gave the signal to the engineer to come back it was an indication to the engineer that the road was ready for him to switch the cars; that in obedience to that signal the cars were backed and run into

No. 8 switch, because that switch was open, when it ought to have been closed; that down in the yard they work under the conductor's orders, and that Conductor Lusby had given an order to put these cars into switch No. 5.

On cross examination said witness testified that he had been a brakeman down there for about seven years and had worked in these yards ever since he went there; that the plaintiff Schubert had worked with him as a member of the yard crew quite often at night, and he also thought he had worked a little with him in the day time; that he had worked with the witness as a brakeman at night after the new yards were put into commission; that during all the time the witness had been working in the 12th Street yard after the improvements were finished and this bridge was built, there was no target on switch No. 8, that there were targets on the other switches; that in order to tell when switch No. 8 was open or closed it was customary for them all to ride on the end of the car and cast their eyes down on the switch when they passed
30 it; that is the way they generally told; that when they were on the ground they could tell in the same way, by looking at it; that you could see it at some distance and did not have to go right up to it, because the reflection from the other switch lights would throw some light there; that it was not the duty of any particular one to see that the switches were closed before the movement was made—whichever one comes to them throws them—of course, the oldest man as a general thing attends to the switches; that there is no rule to that effect, but it is the duty of every man to close and protect the switches before the movement is made, and the witness understood that to be his duty that night; that as he passed No. 8 he did not notice how it was set; that that was the only switch they had to go up to to see whether it was open of closed; it required no orders from the conductor for them to notice the switch points.

Said witness further testified that you could not use a target at the point of No. 8 switch—"It is dangerous—it ain't safe—the men couldn't work there with a target on that side—the track is too close;" that this switch is very near the end of the bridge abutment.

On re-direct examination said witness testified that Schubert was on the cars cutting them loose, the other brakeman was at 8th Street, flagging to protect trains coming from the opposite direction; that the accident occurred between eleven and twelve o'clock at night; that the night was dark; that looking down at the switches from No. 9 switch witness could see the condition of all the switches except No. 8, but No. 8 having no signal you could not tell
31 whether it was open or closed; that if Schubert was on the car, cutting them off he would have his feet in the stirrup and one hand holding onto the grab-iron and the other lifting the cut-off lever.

DYONISIUS J. WATERS, a witness called by and on behalf of the plaintiff, testified that he was a brakeman in the employ of the defendant company and was a member of the crew of the train to which the plaintiff Schubert belonged at the time he was injured; that as brakeman of the train he was subject to the orders of the conductor, and on the occasion of the accident was flagging down at 8th Street; that the movements of the train by the engineer are governed by signals given to him by any member of the train crew; that before giving such signal a man is supposed to know the move that is going to be made and must know that the switches are set to carry out the intended movement; that this is the duty of the man who gives the signal; that the witness was protecting trains on the main line while the shifting movements were going on in the yard; that the "ladder" track, into which the switches lead, runs almost parallel with the main tracks of the road; that there are nine of these side tracks, all running into the "ladder track"; that No. 9 is the longest, and they gradually get shorter all the way down to No. 1; that they tell whether the switches are open or closed by the target on the switches, which is a sort of lantern with a light in it; when the switch is closed, the target is supposed to show white, and when it is open in the yard, the target is supposed to show green; that No. 8 track had no target upon it, all the other switches did have; that this No. 8
32 switch is under the 12th Street bridge.

On cross examination said witness testified that he had been in the service of the defendant company for over six years; that he believes the 12th Street yards were put into service in the summer of 1907; that on the night of the accident the plaintiff Schubert was a member of the yard crew but was only an "extra"; that between the summer or fall of 1907, when the new yards were put into commission, Schubert had been on the crew with him, but witness did not think he was a regular man on the crew; that the witness was mostly on duty at night at that time; that No. 8 switch had no target during all the time that this yard had been used before the accident happened; that if a switch target had been placed at the point of No. 8 switch, under the 12th Street bridge, "it would be liable to injure a person cutting off cars."

On re-direct examination said witness testified that he only had a day job for a short while in the summer and could not say whether Schubert was on that crew with him in the day time or not; that witness was working at that time as a regular member of the yard crew; and Schubert was working as an extra man for that night, just on for that night; that he (witness) thought the yards were opened in the summer of 1907, because it was about the time the Union Station was opened up, but he is not sure of the exact date; that the point of No. 8 switch must be 12 or 14 feet from the end of the western pier or abutment of the 12th Street bridge.

33 THEODORE ALBERT SCHUBERT, the plaintiff, in his own behalf testified that he was employed as an extra brakeman by the defendant company in 1908, and at the time he received his injury was a member of the crew of shifting engine 5109; that this crew was composed of Conductor Lusby, flagman Towney, front brakeman Waters, and himself; that they had been waiting for a crew under Conductor Smallwood to back some cars off of track No 8; that they were on track No. 9, and after Smallwood's crew pulled out of their way, they pulled out and plaintiff was riding on the rear of the train, and as they passed between switch No. 5 and 6, his conductor, Lusby, was standing there and he "hollered" to him to "cut off and look out for four cars in No. 7 track," which meant that the plaintiff was to make the cut and at the same time look out for the cars that he did cut, or in other words, ride them in and see that they did not hit too hard, or if they did not go in clear, to hold them, so that they would not run out, or simply to attend to the cars until they were in place; that by "making the cut" he meant the uncoupling or separation of the cars from the rest of the train; that as they had to pass under the bridge so near the abutment, it was not safe for him to walk on the ground, and at the speed the cars were going he could not walk on the ground and keep up with them, so he had to ride on the cars; that he put his feet into the only position that he could at the time, that is, into the stirrup on the side of the car, held on to the handiron with one hand and lifted the cut-lever with his other hand to separate the cars; that as soon as his train pulled out clear of No. 9 switch, it halted and he jumped down
34 and took a position on the end of the fourth car between the fourth and fifth car- from the rear end, prepared to cut off and to look out for these four cars; that he had one hand on the handiron and his other hand on the cut-lever as the train commenced to move backward; that the train gained speed and by the time it was near the bridge it had attained something like 8 miles an hour; there were something like 15 cars in all and a good large engine; suddenly he noticed that the cars seemed to be rather separating a little bit, and just about that time the four cars that he had cut loose hit; they had separated about half a car length from the train; at that time he was in the same position he had been in when he cut the cars off; that he kept that position owing to the fact that there is danger often that the cars may couple up again upon being overtaken by the cars connected with the engine; when the cars hit the others, the plaintiff bounded up against the car, fell backward onto the track and before he could free himself or get up off the track the other cars of the oncoming train that were connected with the engine caught him at the point of his shoulder, simply following the bone clear out to the elbow and beyond, and mashing all those muscles out, leaving scarcely anything except the bone; that when he got the order from the conductor to cut off the four cars he knew where the conductor was, but he did not pay any attention to whether anybody else was out there or not; that he knew it would be somebody else's duty to throw the switches for the movement of these cars if they were there, and that he was only one member of the crew and that there were two

others supposed to be in the yard at the time; that if there had
35 not been anybody else, he would have had to do it, and that if the conductor had wanted him (plaintiff) in particular to throw the switches, he would have ordered him to do it, but under the orders that he got it was not his duty to look out for the switches at all; that he could not handily have looked out for the switches and occupied the position he did on the end of the fourth car in order to uncouple the cars; that if the man who attends to the switches does not signal the train for the movement, he tells someone else right near him to do it; that the plaintiff did not know who gave the signal; that from where he was on the cars he could have seen the signal but he did not notice in particular because it was his move to go on the cars; that the only change he made in his position after the backward movement commenced and he had gotten on the end of the fourth car was to swing in a little as he reached a point near the end of the abutment of the bridge, where he had noticed a little earlier in the evening a ladder or some other article leaning up against the end of the pier or abutment, projecting towards the track; that he did this because he supposed the ladder was still there and he did not know whether he could clear it or not; that the cars he was riding went into sidetrack No. 8 and hit the cars that had been put in there a few minutes previously by Conductor Smallwood; that he went to work that night about six o'clock first going to the Water Street yards, which are across from the 14th Street yards; that he worked there until between 9 and 10 o'clock, then crossed over to the 14th Street yards; that he was injured about 11.20 and had been working in the 14th Street yards from between
36 9 and 10 until 11.20; that he was extra brakeman on that crew that night.

Said witness further testified on direct examination that on the morning of the trial he had made certain measurements of the distances of the tracks and switches, etc., and that the conditions then existing were the same as they were at the time of the accident; that these measurements showed that the ladder track at the point of No. 8 switch was 5 feet 4 inches from the abutment or pier of the bridge, which is shown in photograph; that from the ladder track to the target of No. 7 and No. 6 switches is 3 feet 6 inches; that from the point of No. 8 switch to the south end of the abutment is 8 feet; from the south end of the abutment to No. 7 switch is 75 feet; from No. 7 switch to No. 6 switch 68 feet; from No. 8 switch to No. 9 switch, from point to point, 65 feet 6 inches; from the point of No. 8 switch to the point of No. 7 switch is 93 feet.

Said witness further testified on direct examination that at the time he was injured his compensation was 29 cents an hour of $3.19 a night of 11 hours, and that he averaged 11 hours a day; that he did not remember how many days in the month he worked, but he could have worked every day if they had given him work; that his earning capacity would have been 90 to 95 dollars and his average earnings were about 60 or 65 dollars a month; that at the time of his injury he had been working for the defendant company about two years and eight months; that he had been away part of this

time and had gotten back about six days before the injury, after an absence of 45 days; that prior to the accident his health had been very good, but since his injury he had not been able to do
37 anything scarcely until the first of the present year, except knocking around on the farm with his father; that owing to his arm he could do no manual labor whatever with his right hand; that he was decidedly right handed; that in addition to having his arm badly torn up, he had three cuts on his head; that the injury to his arm extended from the point of the shoulder down to the forearm. (And thereupon the witness exhibited his injured arm to the jury.)

Said witness further testified on direct examination that after he was injured he was carried to South Capitol Street on an engine, and from there to the Providence Hospital, where he was attended by Dr. Edward Mason Parker, and where he remained three months lacking four days; that it was nearly two months after that before his arm healed up, that as a result of the injury he had considerable pain,—terrible pain after the accident until after the operation was over, and was very sick for about two weeks; that after that he had pain which was not quite as severe as the other pain; that he still had pain in damp weather and in cold weather; and his arm would get cold a great deal quicker than any other part of his body; that he had to wear extra sleeves, etc., on it; that at night he would be wakened by rolling on that side; that it was easy to get the circulation impaired and that gave him pain and he had to turn over before he could get any relief.

On cross examination the plaintiff testified that he operated the camera and took the photographs which had been produced
38 at the trial; that he entered the service of the defendant company October 18, 1905. And thereupon the plaintiff identified his signatures to the papers marked for identification HLB No. 1, HLB No. 1a, HLB No. 1b and HLB No. 1c, and also produced his original certificate of membership in the relief fund of the defendant company, No. 247,018, and his book of regulations forming a part thereof, which certificate and book were marked for identification HLB No. 2.

The plaintiff further testified on cross-examination that between October 1905, when he entered the service of the Company, and the date of the accident in controversy, he was occasionally absent from duty by reason of slight accidents and injuries; that he was off at one time nine days for injuries, and that when he was off for a longer period than three days he received certain payments under the papers identified by him; that when off for a period less than three days he would not get anything; that he began as an extra brakeman and was then promoted to flagman; that his duties called him all over the road from Wilmington to the Potomac Yards on the south side of the Potomac River; that he received his injuries in what was called the 14th Street yard; that it was all one railroad yard from 12th Street up to and including 14th Street; that he could not say when this yard was opened, but it was some time prior to the accident; that he could not recall any particular time when

he was in that yard prior to the accident, although he may have been; that in November 1907 his diary shows that he worked 15 days in various yards around Washington, in December 8 days, in January 1908, 9 days, in February 6 days, in March 4 days, and he was off duty until May 6th, working one day previous to the
39 time he was injured in May; that his record showed that he worked two days in December on the same engine, but that he could not say whether they had any special work in the 14th Street yard or not; that he has no note of how often in 1908 he worked in the 12th and 14th Street yards; that occasionally in the switching operations they would have occasion to pass from one yard to the other.

The plaintiff further testified on cross examination that the ladder track begins at 14th Street and ends at 11th, and that all movements in the yard which involve the placing of cars in position on any of the sidings between 11th and 14th Streets have to be made from the ladder track; that prior to his accident on May 13th he may have known that No. 8 switch had no switch target, but he did not remember knowing it; that it was not his duty as extra brakeman to know all about the location of switches and switch targets; it was his duty to obey the conductor; but that he knew when the conductor ordered a movement to be made what to do with the switches; and this makes it necessary for the brakeman operating trains in the yard to throw at various times the switch levers and to observe the switch targets at the points of the switches; that it was the duty of the man upon the ground or the man that gave the signals to attend to the switches and see that they were right; that the conductor gives the orders for the movement and helps generally with any movement that he wants made.

On re-direct examination plaintiff testified that the switches have targets on them generally; that some of the switches in the
40 defendant's yards had targets and some had not; that his record shows that he worked twice with the same conductor, but does not show definitely that he worked in the 12th and 14th Street yard prior to the accident; that he could not say whether he had or had not—that he might have or might not have worked there.

Edward M. Parker, a witness called by and on behalf of the plaintiff, testified that he had been a resident physician in Washington since 1894 and had made a specialty of surgery since 1891 or 1892, when he went to the Johns Hopkins Hospital; that he was surgeon at the Emergency Hospital for two years, and for the past two years had been visiting surgeon at the Providence Hospital; that he was called to that hospital in May, 1908, between 12 and 1 o'clock at night to attend the plaintiff and found him with two breaks in the skin on the lower part of his arm, one at the point of the elbow and one at the outer side of the elbow; from the one at the end of the elbow was a large mass of muscle protruding and from the wound in the skin there was another large mass of muscular tissue protruding; the skin above that point was just like a loose bag, there being nothing under it except the bone; that a large piece of

muscle was thrust under the skin of the forearm and was lying there loose and entirely detached; that the wounds in the skin were not made from the wheel itself but simply the pressure of the wheel forcing the muscle down through the skin; he had some scalp wounds, but the principal injuries were about the arm and shoulder; the whole muscle on the back of the arm, the triceps muscle, was torn out, so that there was no blood supply left and no
41 nerve supply, and it had to be cut away; the biceps muscle on the front of the arm was likewise torn from its attachment, but there was a little stump of it below which had vitality, but all the rest of it was crushed and filled with cinders and dirt; that had to be cut away, leaving only a small stump of the biceps muscle; the skin of the arm was laid wide open and this little biceps muscle had to be held in place by a stitch three or four inches long; there was only a small stump of the biceps muscle left and none of the triceps at all; it was attached simply at the elbow by the tendon and had to be cut because it had no blood or nerve supply and was of no possible use; the bone was not broken and the blood vessels and principal nerves were uninjured, so that he had a perfectly good pulse and could move his fingers and turn his hand, and the sensation of the skin of his hand and forearm was not affected; the injury simply consisted in forcing out, squeezing out, practically all the muscle of the upper arm; the two or three cuts on the scalp were not of any serious importance; the plaintiff remained in the hospital until some time early in August, and the essential part of the treatment was the operation performed early in August; the plaintiff's condition was rather critical for several days as a result of a shock from the injury, but he gradually improved; that he last saw the plaintiff the night before the trial and that the effect of the injuries described upon plaintiff's present condition is simply the loss of muscular power; the entire triceps muscle, the big muscle at the back of the arm, that is, the muscle with which a man lifts himself on a parallel bar, being gone; he has some
42 power to extend the arm and has the use of the muscles which extend the arm but has lost the additional muscular power of the triceps muscle; the biceps muscle is there, but there is only a little stump at the bottom that is working; he cannot lift a great weight with the arm because four-fifths of the muscle is destroyed; the size of the arm is very small, the arm at one point being hardly thicker than the bone and nerves with the skin around it; the elbow joint is all right but there is a little limitation of motion in the extension of the arm; the loss of the muscle and loss of muscular power is permanent; the major part of the muscular force of the arm, both extension and flexion, is gone; he will lack the muscular power he had before, because the muscle has been taken away; such a wound was necessarily painful and he suffered from nervous shock; there cannot be an injury like that without some suffering, but he did not suffer in any exaggerated degree; there is not ordinarily such a great amount of pain from such a wound; after an operation of that kind, or any operation, there is some smarting pain for several hours, but that is about all, and it is rather the suffer-

ing from the nervous shock; the circulation appears to be perfect now; the circulation in the forearm is unimpaired entirely; there was only temporary nervous shock, and the witness thinks there is no permanent effect on the nervous system.

WILFRED P. BORLAND, a witness called by and on behalf of the plaintiff, testified that he was Secretary of the Block Signal and Train Control Board of the Interstate Commerce Commission, and that before he went with the Commission he had been em-
43 ployed in different departments of train service on railroads for a little over 20 years and had been with the Commission for 7 years; that he had been employed on different railroads in the capacity of conductor, trainman, engineer and fireman, in all sorts of train work during the time mentioned; that the board of which he is secretary was created and organized to carry out a resolution of Congress directing the Interstate Commerce Commission to investigate, test and report on safety appliances, which includes block signals, targets, switches, etc.; that he has no close familiarity with the 12th or 14th Street yards of the defendant railroad company, but the day before the trial looked at the location of the switches from the bridge; that this was all the information he had as to the location and lay-out of the tracks.

And thereupon counsel for the plaintiff propounded to the witness the following question:

"Q. It is in evidence that the ladder track to what is known as the pier is five feet four inches from the point of switch No. 8. Were those switches pointed out to you—No. 8, No. 7 and No. 9? A. Yes, sir.

"Q. It is also in evidence that from the ladder track to the target on switch No. 7 and switch No. 6 it is three feet six inches; and that it is five feet four inches from the point of switch No. 8 of the ladder track to the nearest abutment or pier. I will ask you to tell the jury, if you are able to state from the examination you made and from your experience as a railroad man, whether or not a target could have been properly erected at switch No. 8? It is in
44 evidence that no target is there, or was there."

And thereupon the defendant by its counsel interposed and objected to said question being asked, on the ground that said witness was not qualified to testify upon said subject, having made but one observation in the daytime from the bridge and knowing nothing of the requirements of the Acts of Congress or the necessities of the defendant's business, or the lay-out of the tracks and switches in the yards, etc., and because said evidence was not competent under the declaration and the Employers' Liability Act of 1908, which refer only to negligent omissions in the performance of duty and not to intentional omissions in original design or construction; but the Court overruled said objection and permitted said question to be asked and the answer thereto to be given to the jury, whereupon counsel for the defendant then and there excepted to said ruling of the Court and said exception was duly entered upon the minutes of the Court. And thereupon said counsel

for the plaintiff repeated said question and the same was answered by the witness as follows:

"Q. Repeating my question, the evidence shows that the nearest pier or abutment to the point of switch No. 8, or the ladder track at the point of switch No. 8, is five feet four inches from the abutment; that the targets on No. 7 and No. 6 switches are within three feet six inches of the ladder track; that from the point of No. 8 switch to the south end of the abutment is eighteen feet, and from the south end of the abutment to No. 7 switch is seventy-
45 five feet, or ninety-three feet between the point of switch No. 8 and the point of switch No. 7; that from No. 7 switch to No. 6 switch it is sixty-eight feet; and from No. 8 switch to No. 9 switch it is sixty-five feet six inches. You have been down and have gone over those tracks down there. It appears that the nearest pier to the ladder track at the point of switch No. 8 is five feet four inches. I will ask you to tell the jury, after your examination of those tracks, if a target light could have been properly put and located at the end of switch No. 8? A. My observation of the layout of those tracks down there would indicate to me that it would have been a matter of practical impossibility to properly locate a target of the character of the targets that were used there at No. 8 switch, and do it safely."

Thereupon counsel for the plaintiff propounded to said witness the following question:

"Can you tell the jury whether or not a target could have been properly and safely located in connection with switch No. 8, as these yards are now constructed, so that that target could have been observed by the employees of the Company operating upon that yard?"

To which question counsel for the defendant interposed and objected for the reasons already given as aforesaid, but the Court overruled said objection and permitted said question to be asked and the answer thereto to be given to the jury, to which ruling of the Court counsel for the defendant then and there excepted, which exception was duly entered at the time upon the minutes of the Court.

46 Whereupon said witness answered said question as follows:

"I think it would have been possible to have indicated the position of the switch by a target, by means of mechanical connections, and a high target. These are low targets here. There could have been mechanical connections, and the rod run underneath the track, leading out from the point of No. 8 switch and running up close to the abutment at the side; which in my opinion would have served the purpose perfectly, and given a good indication for that switch. Those things are located, and switches are indicated in that position in quite a number of instances that I know of.

"Mr. FLANNERY: I object to the answer of the witness, and move to strike out, especially, the last part, which I think is very objectionable. The question is not what was done by other companies under other conditions.

"The COURT: No; the question is what is a reasonable and safe appliance, and there is where you get into difficulty now.

"Mr. COX: The last part of the answer was not responsive to the question, and I think might go out.

"The COURT: Very well. (To the jury.) Do not pay any attention to that part of the answer which indicates that he knows of places where it has been done."

On cross examination said witness further testified that the targets are directly connected with the switch levers; that when the lever is thrown it turns the light in the target; that the position of the target has a great deal to do with the position in which you
47 are compelled to put the lever, and that if the space between the tracks or between the track and some obstruction like a pier-head is not sufficient for the lever, that governs to a great extent the position of the light.

And thereupon it was agreed by and between counsel for plaintiff and defendant that the train rules of the defendant company and the photographs used in the examination of the witnesses might be considered in evidence.

And thereupon counsel for plaintiff announced their testimony closed.

And thereupon the defendant to maintain the issues upon its part joined gave evidence by the witnesses hereinafter named, tending to prove as follows:

68

ROBERT FARNHAM, a witness called on behalf of the defendant, testified that he was a civil engineer in the employ of defendant company; that in the year 1908 and for 5 or 6 years prior thereto he was in charge of the Washington improvements in eliminating grade crossings, and had charge of the construction of the bridges in the vicinity of 12th Street, the lay-out of the tracks there, the placing of switches, switch lamps, etc.; that a switch target was omitted on No. 8 switch because there was not room between the rail and the buffer wall of the bridge to allow the men to work in there and to operate, therefore the target had to be left out and the lever put on the other side of the track in order to keep the men from getting into a position where they would be squeezed between the wall and the rail; that it would have been possible
48 to place the target anywhere, but it would not have meant anything in regard to that switch unless it was placed right at the point of the switch.

On cross examination said witness testified that he was practically told to place the switches at that point by the defendant company, and in locating No. 8 switch where he did he acted under the directions of the defendant; that they had to fit the conditions, to get as much yard room as they could, but it was impossible to get that switch away from the buffer wall; they had to locate it there in order to get anywhere near the same amount of yard room; that in order to get longer tracks he located this switch for siding No. 8 under the bridge between the abutments, under the direction of the defendant and in accordance with the plan agreed upon by everybody concerned,—that is, everybody on the railroad, and approved by the District Commissioners; that his recollection is that

to have shortened the tracks would have made the curve so excessive that they would have had to abandon some track entirely—to give up a track, so that in trying to get all the tracks in there it became necessary to locate the switch at this point; that they could have put the target there by shortening up the rods, but it would have been bad practice and unsafe, it would have attracted the men to that side of the track, where they would have been in danger of being crushed between the car and the pier. And thereupon said witness was asked the following question and answered the same as follows:

"Q. Suppose you had put the target a little beyond the abutment, by lengthening the levers that work the target from the switch. Could you not have done that? Would not the men have
49 learned that that was the odd switch target standing off there a little distance, and known that as No. 8? A. Hardly much better than they would have got used to the fact that there was no target at all. It would have conflicted with the target for the next switch. It would have been very close to it."

And thereupon said witness on cross examination further testified that he imagined the distance between the points of the two switches was about 80 feet, and this would have made it about 40 feet from the other target; that if that switch had been located up there 40 feet, the men working about the yards might have learned or have been able to recognize it as the target for switch No. 8, that he imagined they would have.

On re-direct examination said witness testified that it would have conflicted because the targets would have been very close, closer than any two switch targets are ever put.

And thereupon said witness on re-cross examination testified as follows:

"Q. Instead of being eighty feet from the others there would have been forty feet or fifty feet between it and the others? A. And it may have been that they were directly in line, and you would have only have seen one target which would have been a great deal more dangerous than having none at all.

"Q. You cannot say that positively? A. I cannot.

50 "Q. The only effect would have been to put that target within about forty feet of the others, if located as indicated in my previous question? A. It would have been an unusual practice, and a great deal more dangerous, to our way of thinking, than leaving the target off, and notifying trainmen that there was no target.

"Q. So you located it down there because you did not have room, and that was the usual place to locate it, and you considered it better practice? A. There are certain limitations in laying out a yard that have to be taken into account.

(This witness testified out of order, being called just after the witnesses Bell and Towney, who testified on behalf of the plaintiff.)

WILLIAM F. GREENE, a witness called by and on behalf of the

defendant, testified that he was a civil engineer by profession and had been following that profession since January 1899; that in May 1908 he was Supervisor of Tracks for defendant company in Washington and had held that position since May 1, 1905; that he had had charge of the maintenance of the 12th and 14th Street yard of the defendant; that there was no target opposite the point of No. 8 switch because there was no place to put a target there, the switch target is located about three feet six inches from the nearest rail, and the clearance of No. 8 switch between the nearest rail and the abutment is 5.3 feet, that by placing a switch lamp as you would have to do at a distance of three feet six inches, it would place
51 the lamp in the path of the train men when they walked back and forth making cuts; that these targets are attached to and operated by ground levers; that No. 9 switch had a ground lever known as the New Century Switch Stand, indicated on the photograph No. 78; the lever and switch operate together; the lever for No. 8 switch was on the opposite or north side of the ladder track, between No. 8 and No. 9 track, and the levers for the balance of the switches were on the opposite side; that they could not put the switch lever for No. 8 track on the south side because it would have been in the way of the men passing back and forth between the track and the pier. And thereupon said witness on direct examination further testified as follows:

"Q. Was it possible to have put either a target or a switch lever connected with a target at any point nearby the opening of No. 8 switch, so as to indicate when that switch was opened and closed? Was it possible to put that target at any other point? A. No, sir.

"Q. If it had been placed at any other point what effect would it have had upon the operations of the other switches and the other targets that we see indicated on this photograph, for No. 7, No. 9 and No. 6? A. The lights would have been confused with the other switch lamps.

"Q. When was this yard opened for business, Mr. Greene? A. October 1st, 1907.

"Q. At the time it was opened was any switch target pro-
52 vided for No. 8 switch? A. No, sir.

"Q. And between that time and the date of this accident was any change made in that situation? Was any light provided? A. No, sir.

"Q. When a switch of this kind has no target, how do you tell whether it is open or closed? A. By the position of the switch point.

"Q. By 'switch point' do you mean these pointed ends indicated on these photographs (indicating)? A. Yes, sir; the point indicated by your pencil.

"Q. And when they are closed the point and the rail are together? A. Yes, sir.

"Q. And when opened they are spread out, spread apart? A. Yes, sir.

"Q. When there is no target how do you tell whether the switch points are opened or closed? A. By observing the switch points.

"Q. Was there any other switch in this vicinity, in this yard,

that had no target? A. None in this yard, but there were switches in this vicinity."

On cross examination said witness testified that his duties related to the maintenance of the tracks and he had nothing to do with the locating of the yard, but had something to do with the locating of the targets; that in locating them he simply followed the instructions of his superiors; that he could not recall the
53 distances exactly, but as nearly as he could recall it was about 70 feet between switches No. 8 and 9, about 80 feet between No. 7 and 8. And thereupon said witness on cross examination further testified as follows:

"Q. Why could not switch No. 8 have come in nearer to No. 7? One of the witnesses testified, by actual measurement, that there is 93 feet between the points of those switches. Why could not switch No. 8 have been moved down towards switch No. 7 so as to have gotten it out from under that abutment entirely? A. To make such a construction would spoil the arrangement of the yard, which had been approved by the Commissioners.

"Q. It was located there; and there was no reason why it should not have been located somewhere else within the 93 feet, especially, that you know of. All you know is that you were instructed to locate the targets on the tracks. A. I had nothing to do with the location of the switches.

"Q. You do not know of any reason why it should not have been located nearer No. 7 switch? A. Except that it would spoil the arrangement of the yard, and it was not physically possible to do it."

Eden B. Hunt, a witness called by and on behalf of the defendant, testified that he was Assistant Superintendent of the Pennsylvania Railroad Voluntary Relief Department, which department operates the four relief funds of the defendant, the Philadelphia, Baltimore & Washington Railroad Company, the Northern Cen-
54 tral Railroad Company, the West Jersey Railroad Company and the Pennsylvania Railroad Company; that the same officers are in charge of each fund, and that he was Assistant Superintendent of these respective relief funds and had the custody of the records showing the payments into those various funds and payments made out on account thereof. And thereupon said witness testified that he was the custodian of and produced a card record of the absences of Theodore A. Schubert, holding certificate No. 247,018, which record of absences was prepared from papers received from division officers and medical examiners; that this record showed the absences on account of injury of said Schubert between October 18, 1905 and the date of the accident in May 1908; that it did not show the amount of the benefits paid to him, but that he (witness) could and did calculate the amount of such benefits by knowing the class of which Schubert was a member; that he was able to state accurately the amount that Schubert received during the period of time just mentioned, on account of disablement; that his records also showed the amounts contributed by the defendant

for or on behalf of the relief fund of that company of which Mr. Schubert was a member.

And thereupon the defendant further to maintain the issues upon its part joined offered in evidence in release and bar of the plaintiff's right to recover in this action the plaintiff's application and contract of membership in said relief fund and the three separate receipts given by the plaintiff for payments made to him out of said fund, the signatures to which papers had been admitted by the plaintiff and which papers had been marked for identi-
55 fication, and also offered in evidence in connection therewith and for the same purpose the certificate of membership in the relief fund of the Pennsylvania Railroad Voluntary Relief Department, No. 247,018, and the book of regulations forming a part thereof, which had been issued to plaintiff, and the original of which had been produced by him in response to notice.

The aforesaid papers so offered in evidence by counsel for the defendant are in the words and figures following, to wit:

R. D. 53. S 43 6 11 1904.

Philadelphia, Baltimore & Washington Railroad Company.

Relief Department.

Application for Membership in the Relief Fund.

To the Superintendent of the Relief Department:

1 I, Theodore Albert Schubert of Washington, D. C., in the county of ——
2 and state of —— employed —
3 in the service of the Philadelphia, Baltimore & Washington Railroad Company,
4 as Brakeman upon the Maryland Div. C. T. Department,
5 do hereby by reason of such employment, apply for membership in the Relief Fund and consent and agree to be
6 bound by the Regulations of the Relief Department of the said Company, as contained in the book of said Regulations approved by the Board of Directors, which
7 I have read or have had read to me, and by any other regulations of the said Department hereafter adopted,

56

8 and by the provisions of any agreement or agreements made by the said Company with any other corporation or
9 corporations associating in administration of their respective Relief Departments, in accordance with said book of Regulations.
10 I also agree, That the said Company, by its proper Agents, and in the manner provided in said Regulations,
11 shall apply as a voluntary contribution from any wages earned by me under said employment or from benefits that may hereafter become payable to me at the rate
12 of two dollars and ten cents per month, for the pur-

pose of securing the benefits provided for in the Regulations for a member of the Relief Fund of the Second Class, a "and additional death benefit, —— a equal to twice the death benefit of the first class." Unless I shall otherwise designate in writing, with the approval of the Superintendent of the Relief Department, a death benefit shall be payable to my father

Mannassas D. Schubert,
Experiment,
Amherst Co.,
Va.

And if any person now or hereafter designated by me to receive the death benefit shall not be living or shall be incapacitated for

executing the requisite receipt and release, or if there shall be no such person, the death benefit shall be payable as provided in the Regulations of the Relief Department for such event. And I agree that the acceptance of benefits from the said Relief Fund for injury or death shall operate as a release of all claims for damages against said Company, arising from such injury or death, which could be made by or through me, and I or my legal representatives will execute such further instrument as may be necessary formally to evidence such acquittance.

I also agree, That this application, when approved by the Superintendent of the Relief Department, shall make me a member of the Relief Fund on and from the date upon which — the provisions of the Regulations and the terms of this application, it takes effect, and shall constitute a contract between myself and the said Company, and that the terms of this application and the Regulations of said Department shall, during my membership, be a part of the conditions of my employment by the Company, and that the same shall not be avoided by any change in the character of my service, or locality where rendered, while in such employment, nor by any change in the amounts applicable from my wages to the Relief Fund, which I may hereafter consent to, and that the

58

35 agreement that the above-named amounts shall be appropriated from my wages shall apply also to any other amounts arising from
36 changes made as aforesaid and shall constitute an appropriation and assignment in advance, to the said Company in trust, for the
37 purposes of the Relief Fund, of such portions of my wages, which assignment shall have precedence over any other assignment by
38 me of my wages, or of any claim upon them on account of liabilities incurred by me.
39 I also agree, for myself, and those claiming through me, to be especially bound by Regulations numbered 65, providing for final
40 and conclusive settlement of all disputes, by reference to the Superintendent of the Relief Department and an appeal from his
41 decision to the Advisory Committee.
42 I certify that I am correct and temperate in my habits; that so far as I am aware I have no injury or disease, constitutional or
43 otherwise, which will tend to shorten my life, and am now in good health and able to earn a livelihood.
44 I also agree, That any untrue or fraudulent statement made by me to the Medical Examiner, or any concealment of facts in

59

45 this application, or resignation from the service of the said company or my being relieved from employment and pay therein at the
46 pleasure of the Company or its proper officers, shall forfeit my membership in the aforesaid Relief Fund and all benefits, rights or
47 equities arising therefrom, excepting that my leaving the service shall not (in the absence of any of the other foregoing causes of
48 forfeiture) deprive me of any benefits of which I shall have previously become entitled by reason of accident or
49 sickness occurring while in the service.
50 This application to take effect the Eighteenth day of October, A. D. 1905,
51 if I shall be on duty on that date; otherwise upon the date of my going on duty thereafter.
52 In Witness Whereof, I have signed these presents at Washington, D. C., in the county of ——
53 State of —— this twenty sixth
54 day of October, A. D. 1905.

Witness: THEODORE ALBERT SCHUBERT.
P. H. STELTZ, JR.
witness to "Mannassas", in signature of father corrected.
P. H. STELTZ, JR.
R. D. BARRATT,
witness to MANNASSAS D. SCHUBERT,
(Father assenting.)

The foregoing application is approved at the office of the Superintendent of the Relief Department at Philadelphia, in the county of Philadelphia, State of Pennsylvania, this eighteenth day of December, A. D. 1905.

No. 247018.

E. B. HUNT,
Assistant Superintendent of the Relief Department.

60 *a*. If no additional death benefit is taken in this application, draw lines through the words "and additional death benefit" and all following, to and including the word "class" in the next line. If no beneficiary is specially designated draw lines through the blank space. These are not to be noted by the witness.

Record W.		Card T.		Statistics		B
Cert.		Dept. 688				
Issued. 12/18/05	S.	?	DTM		SWT	C

Questions Answered by Applicant for Membership, in Connection with Annexed Application.

1. What is your name in full, including given name?	1. Theodore Albert Schubert.
2. When were you born?	2. Dec. 3rd, 1884.
3. Where were you born?	3. Levy Co. Florida.
4. Are your parents living? If so, give their names. If not living, give age at, and cause of death.	4. Father. Mannassas D. Schubert. Mother. Deceased—38 years—Unknown.
5. Are you married or have you been? If wife (or husband), living give name.	5. No.
6. Have you any children living? If so, give names and ages. If none, so state.	6. None.
7. What are the names of your brothers and sisters? (If married this question need not be answered.)	7. Pearl B.—No brothers deceased. Edith I. Turner—no sisters deceased.

61

8. Have you been furnished with a copy of the book of regulations of the Pennsylvania Railroad Voluntary Relief Department? Yes.
9. Can you read print? Yes. 10. Have you read those regulations? Yes. 11. Have you had those regulations read to you? No.
12. Have you had a sunstroke? No.
13. Are you a subject to fits. No.
14. Have you a stricture? No.
15. Have you hemorrhoids? No.
16. Have you a rupture? No.
17. Have you had articular rheumatism? No.

18. Have you had small-pox? No.
19. Have you been vaccinated? Yes.
20. Have you any other disease or physical infirmity? No.
21. Is there any disease you are likely to have inherited? No.
22. Do you know of any reason why you should not be accepted? No.
23. Have you ever been employed by any of the Companies associated in the administration of the Relief Department? If so, give name of Company, character and dates of employment with each Company, including the present service. Since Oct. 18th, 1905 as Brakeman upon the Maryland Div. C. T. Dept.

I have read or have had read to me the above questions and the answers, and do hereby certify that the answers are true to the best of my knowledge and belief.

Signature of applicant.

THEODORE ALBERT SCHUBERT.

Witness:

The following made before execution:

In answer to Question 7 name "Pearl B" corrected.

P. H. STELTZ, JR., *M. D.*

Oct. 26th, 1905.

62

24. Intelligence.	24. Average.
25. General development.	25. Muscular.
26. Height.	26. 5 ft. 10½ in.
27. Weight.	27. 157 lbs.
28. Chest measure.	28. 36 in. (full insp.)
29. Abdominal measure.	29. 30 in.
30. Sex.	30. Male.
31. Hair.	31. Brown.
32. Complexion.	32. Fair.
33. Eyes.	33. Blue.
34. Special senses.	34. Normal.
35. Head and face.	35. Normal.
36. Abdomen and groins.	36. Normal.
37. Spine and joints.	—. Normal.
38. General surface.	—. Normal.
39. Heart: *a.* Number and character of pulse beats.	39. *a.* 74—full & regular.
b. Where apex beats.	*b.* Normal.
c. Ausculation.	*c.* Normal.
d. Blood-vessels.	*d.* Normal.
40. Lungs: *a.* Number and character of respirations.	—. *a.* 18—easy—abdominal
b. Percussion.	*b.* Resonant.
c. Ausculation.	*c.* Normal.
d. Character of respiratory murmur.	*d.* Vesicular.

41. Kidneys and bladder.	41. No evidence of disease.
42. Cachesia, Diatheses, temperate, &c.	42. None, — temperate.
43. Opinion as to applicant's statement after examination.	43. Truthful.
63	
44. Opinion of applicant's chances for longevity.	44. Expectancy.
45. Vaccinated when examined.	45. No.
46.	46.
47. If applicant rejected, for what cause.	47.

I certify that the above questions were answered advisedly as stated therein, by the person named as applicant in the annexed application, that the description and facts relating to the applicant are as ascertained from him, that I have carefully examined him, that the above is a correct sketch of his existing condition, according to my best of knowledge and belief, and I do hereby, approve said (cant)
application as physically qualified.

Place and date of examination, Washington, D. C., Oct. 26th, 1905.

P. H. STELTZ, JR., *M. D.*,
Medical Examiner.

The above certificate examined and applicant found physically qualified.

F. W. LATTA, *M. D.*,
Chief Medical Examiner.

Philadelphia, Pa., Nov. 3, 1905.

10/26/05 per RD 175 attached O. D. 28.

HL B. No. 1*a*

64

R. D. 53.

Philadelphia, Baltimore & Washington Railroad Co.

Relief Department.

Application for Membership in the Relief Fund.

Do not fill up these blanks.

Number ——.
Name ——.
Post office ——.
Division ——.
Road, Shop, or Office, &c. ——.
Department ——.

65 R. D. 65. (HL. B. No. 1.)

The Pennsylvania Railroad Voluntary Relief Department.

Office of the Superintendent.

Order No. 50841.

PHILADELPHIA, PA., *Jun-* 3, 1908.

Treasurer Pennsylvania Railroad Company, Philadelphia, Penna.

Will pay T. A. Schubert, Certificate No. 247018, employed as Brakeman, by the Philada. Balt. & Wash. Railroad Company. Eighteen Dollars $18.# Benefits for 18 days from May 14, to 31 inclusive, on account of accident and charge "Relief Fund Orders".

Approved for payment.

J. C. VAN RODEN,
For Superintendent.

46. (S.) F. W. HUTCHINSON,
For Comptroller.

Received June 12, 1908, Eighteen Dollars in full for the H. above order.

(Signature) T. A. SCHUBERT.

Witness:
(S) C. M. WATTS.

Read This. This receipt must be dated, signed by the person in whose favor is drawn, and witnessed by some one knowing the signer to be the proper person. The signature must conform to the name as written in the order. A person unable to sign will make his mark.

[On margin:] This order is payable by any Freight or Passenger Agent of the Pennsylvania R. R. Company's system east of Pittsburgh and Erie or by any Bank designated as a depository of the Company, when receipted in accordance with instructions below.

Endorsement on back:

Theo. A. Schubert.

Pay to the order of any Bank or Banker,
all prior endorsements guaranteed,
The National Capital Bank,
of Washington, D. C.
H. H. McKee, Cashier.

Payment Received
Jun- 15, 1908.
The Philad'a Nat'l Bank.
H. J. Keser, Cashier.

66 R. D. 65. (HL. B. No. 1*b*).
CEW.

The Pennsylvania Railroad Voluntary Relief Department.
Office of the Superintendent.

Order Number 51194.

PHILADELPHIA, PA., *Jul-* 6, 1908.

Treasurer Pennsylvania Railroad Company, Philadelphia, Penna.

Will pay T. A. Schubert, Certificate No. 247018, employed as Brakeman, by the Philada. Balt. & Wash. Railroad Company Thirty Dollars $30.# Benefits for 30 days from June 1 to 30 inclusive, on account of Accident and charge "Relief Fund Orders".

Approved for payment.

J. C. VAN RODEN,
For Superintendent.

46. (S.) F. W. HUTCHINSON,
For Comptroller.

Received July 10, 1908 Thirty Dollars in full for the H. above order.

(Signature) T. A. SCHUBERT.

Read This. This receipt must be dated, signed by the person in whose favor is drawn, and witnessed by some one knowing the signer to be the proper person. The signature must conform to the name as written in the order. A person unable to sign will make his mark.

[On margin:] This order is payable by any Freight or Passenger Agent of the Pennsylvania R. R. Company's system east of Pittsburgh and Erie or by any Bank designated as a depository of the Company, when receipted in accordance with instructions below.

Endorsements on back:

The Washington Terminal Co.
Jul- 11, '08.
Washington, D. C.

For Deposit
Phila. Balto. and Washn. R. R. Co. 4
Jos. Kamps, Agent,
Washington, D. C. Station.

Received Payment
July 14, 1908,
Market Street National Bank,
W. P. Sinnett, Cashier.

Pay to the order of any Bank or Banker, prior endorsements guaranteed. National Metropolitan Bank, L. Gales Moore, Cashier.

67 R. D. 65. H. L. B. No. 1*c*.
CEW.

The Pennsylvania Railroad Voluntary Relief Department.

Office of the Superintendent

Order Number 51532.

PHILADELPHIA, PA., *Aug.* 4, 1908.

Treasurer Pennsylvania Railroad Company, Philadelphia, Penna.

Will pay T. A. Schubert Certificate No. 247018 employed as Brakeman by the Philada. Balt. & Wash. Railroad Company Thirty-one Dollars $31.# Benefits and charge "Relief Fund Orders".

Approved for payment.
46.

J. C. VAN RODEN,
For Superintendent.

F. W. HUTCHINSON,
For Comptroller.

Received Aug. 7, 1908, Thirty-one Dollars in full for the above order.

(Signature) T. A. SCHUBERT.

Witness:
C. M. WATTS.

A.

Read This. This receipt must be dated, signed by the person in whose favor is drawn, and witnessed by some one knowing the signer to be the proper person. The signature must conform to the name as written in the order. A person unable to sign will make his mark.

[On margin:] This order is payable by any Freight or Passenger Agent of the Pennsylvania R. R. Company's system east of Pittsburgh and Erie or by any Bank designated as a depository of the Company, when receipted in accordance with instructions below.

Endorsements on back:

A. G. Fraveis.
For Deposit
Phila., Balto. and Washn. R. R. Co.,
Jos. Kamps, Agent,
Washington, D. C., Station.

Pay to the order of any Bank or Bankers,
Prior endorsements guaranteed
National Metropolitan Bank,
L. Gales Moore, Cashier.

Received Payment,
Aug. 11, 1908,
Market Street National Bank
W. P. Sinnett, Cashier.

CERTIFICATE

OF

MEMBERSHIP IN THE RELIEF FUND

AND

REGULATIONS

GOVERNING

THE PENNSYLVANIA RAILROAD VOLUNTARY RELIEF DEPARTMENT.

THE PENNSYLVANIA RAILROAD VOLUNTARY RELIEF DEPARTMENT.

Certificate of Membership in the Relief Fund.
No. 247018

Office of the Superintendent, Philadelphia, Pa., Oct. 18, 1905.

THIS CERTIFIES That Theodore A. Schubert employed by THE PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY is a member of the Relief Fund of that Company, and is entitled to the Benefits provided by the Regulations of the Relief Department for a member of the second class, with two additional Death Benefits of the first class.

(Signed) E. B. Hunt
Assistant Superintendent
of the Relief Department.

R. D. 1.

41

REGULATIONS

GOVERNING

THE PENNSYLVANIA RAILROAD VOLUNTARY RELIEF DEPARTMENT.

Being an Association in joint administration of the Relief Departments of the following corporations, approved by the several Boards of Directors:

THE PENNSYLVANIA RAILROAD COMPANY,
THE NORTHERN CENTRAL RAILWAY COMPANY,
THE PHILADELPHIA, BALTIMORE & WASHINGTON R. R. CO.,
THE WEST JERSEY & SEASHORE RAILROAD COMPANY.

TAKING EFFECT FEBRUARY 1, 1886,
MODIFIED FROM MAY 1, 1886,
AMENDED TO TAKE EFFECT OCTOBER 1, 1887,
MARCH 1, 1889, JUNE 1, 1891, APRIL 1, 1892,
JANUARY 1, 1897, JANUARY 1, 1900,
JANUARY 1, 1902,
AND JANUARY 1, 1904.

THE PENNSYLVANIA RAILROAD VOLUNTARY RELIEF DEPARTMENT.

DESCRIPTION OF THE METHOD OF ASSOCIATION IN JOINT ADMINISTRATION OF THE RELIEF DEPARTMENTS OF THE FOLLOWING NAMED COMPANIES.

Modified—January 1st, 1892, upon the withdrawal of the Baltimore & Potomac Railroad Company;
January 1st, 1902, to cover representation of the Buffalo & Allegheny Valley Division of the Pennsylvania Railroad Company on the Advisory Committee.

The Northern Central Railway Company, the West Jersey Railroad Company, the Philadelphia, Wilmington & Baltimore Railroad Company and the Camden & Atlantic Railroad Company, having each adopted a Relief Department similar in plan to that adopted by the Pennsylvania Railroad Company, as in the Regulations hereinafter printed, and being associated in interest with that Company, have associated themselves in the administration of their several Relief Departments with the said Pennsylvania Railroad Company by agreement in the following form:—

"*Memorandum of Agreement* entered into this
" day of , 1886,
"between the Pennsylvania Railroad Company, party of
"the first part, and the Northern Central Railway Company,
"the West Jersey Railroad Company, the Philadelphia, Wil-
"mington & Baltimore Railroad Company and the Camden &
"Atlantic Railroad Company, parties of the second part.

"*Whereas*, The Pennsylvania Railroad Company, party of
"the first part, has established a Relief Department for the

"benefit of its service and employes, a copy of the plan of "which is hereto attached and marked Exhibit A, and

"*Whereas*, The said parties of the second part have also "each adopted a plan similar as to form, and

"*Whereas*, Each of said plans contains, among other things, "the following, namely:—

"Should any other corporation or corporations associated "in interest with this Company, adopt or have adopted regu- "lations establishing Relief Departments similar to the one "hereby established, this Company shall have power to asso- "ciate itself with such corporation or corporations in the "administration of the Relief Departments hereby and thereby "established, when so authorized by the respective boards of "directors of this and said corporation or corporations.

"Such association shall be evidenced by agreement or "agreements duly executed authorizing, among other things, "the constitution of a Joint Advisory Committee, to be chosen, "as and in the manner herein prescribed, by the several parties "thereto, and their employes, either by separate action in "behalf of each of said parties, or by the united action of "two or more of them as to any member or members of said "Committee; the original Committee to be constituted and "vacancies occurring thereafter to be filled, in such manner "as shall be prescribed.

"In the event of any association as aforesaid, the functions "and powers herein given to and vested in the Advisory Com- "mittee created as hereinbefore provided, shall during the "continuance of said agreement or agreements, be transferred "to and vested in the Advisory Committee constituted as "prescribed in said agreement or agreements, chosen as therein "directed, and so much of the Organization and Regulations "of the Relief Department herein provided for, as relates to "the constitution of an Advisory Committee consisting solely "of officers and employes of this Company, shall be sus- "pended, with the understanding, however, that upon the "determination of such agreement or agreements, the Advisory "Committee herein provided for, constituted as herein pre-

"scribed, shall reassume the functions and duties herein "committed to it.

"*And Whereas*, The Companies, parties hereto, being asso- "ciated in interest, it has been deemed wise, in order to "secure uniformity as well as economy in operation and "management, that there should be a substantial identity of "persons in the principal control of the said relief plans "respectively, and particularly that one Joint Advisory "Committee should stand for and represent respectively as "well the party of the first part as the several parties of the "second part.

"*Therefore this Agreement Witnesseth*, That the said parties "do hereby, in consideration of the premises, mutually "covenant and agree as follows:—

"FIRST, That each of the parties hereto having now the "same person as General Manager, shall also designate the "same persons to act as Superintendent of the Relief Depart- "ment, and any other general officers necessary for conducting "the business thereof, and the same location for its office, and "do particularly agree that the Treasurer, for the time being, "of the Pennsylvania Railroad Company shall be Treasurer "of the Relief Fund of each of the said corporations.

"SECOND, That a Joint Advisory Committee possessed with "all the powers of the several Advisory Committees pro- "vided for in the plans of said corporations, parties hereto, "shall be constituted as follows:—

"The General Manager shall be *ex-officio* a member and "chairman, and the Superintendent Secretary, of the Com- "mittee. The other members of the Committee shall be "members of the Relief Fund. They shall be chosen in the "month of November, to serve from the first day of Jan- "uary next succeeding, for periods hereinafter stated, and "until their successors are chosen, as follows:—

"By the contributing employes of the Pennsylvania Rail- "road Division of the Pennsylvania Railroad, from among "themselves, one member;

"By the contributing employes of the United Railroads "of New Jersey Division of the Pennsylvania Railroad, from "among themselves, one member;

"By the contributing employes of the Philadelphia & Erie "Railroad Division of the Pennsylvania Railroad, from "among themselves, one member;

"By the contributing employes of the Buffalo & Allegheny "Valley Division of the Pennsylvania Railroad, from among "themselves, one member;

"And by the Board of Directors of the Pennsylvania Rail-"Road Company, four members:

"By the contributing employes of the Northern Central "Railway Company, from among themselves, one member;

"And by the Board of Directors of that Company, one "member:

"By the contributing employes of the Philadelphia, Balti-"more & Washington Railroad Company, from among "themselves, one member;

"And by the Board of Directors of that Company, one "member:

"By the contributing employes of the West Jersey & "Seashore Railroad Company, from among themselves, one "member;

"And by the Board of Directors of that Company, one "member.

"Members of the Committee chosen in the month of "November, 1904, shall be chosen to serve as follows:—

"Those chosen by the contributing employes of the Penn-"sylvania Railroad Division, and one of those chosen by the "Board of Directors of the Pennsylvania Railroad Company, "to be designated by said Board, for the period of three years.

"Those chosen by the contributing employes of the Phila-"delphia & Erie Railroad Division and the Buffalo & "Allegheny Valley Division of the Pennsylvania Railroad "Company, and the Northern Central Railway Company, and "two of those chosen by the Board of Directors of the Penn-"sylvania Railroad Company, to be designated by said Board, "as well as the member chosen by the Board of Directors of "the Northern Central Railway Company, for the period of "one year.

"Those chosen by the contributing employes of the United "Railroads of New Jersey Division of the Pennsylvania

'Railroad Company, the Philadelphia, Baltimore & Wash-
'ington Railroad Company and the West Jersey & Seashore
'Railroad Company, and one of the members chosen by the
'Board of Directors of the Pennsylvania Railroad Company
'and the members chosen by the Board of Directors of the
'latter two Companies, for the period of two years.

"The successors of the members chosen as before men-
'tioned, shall be chosen to serve for the period of three
'years respectively.

"The members selected by the contributing employes shall
'be chosen by ballot, the vote being taken and certified by
'tellers selected by the Joint Advisory Committee. In
'balloting for members of the Committee, each contributing
'employe, member of the Relief Fund, will be entitled to
'cast one vote.

"Under this agreement, to fill vacancies occurring on the
'Advisory Committee the members to represent the con-
'tributing employes shall be designated by the General
'Manager, and the members to represent the Company shall
'be chosen by the several Boards of Directors, such mem-
'bers to serve until their successors are duly chosen as above.

"THIRD, That nothing herein contained shall be held to
'alter or modify any part of the existing Organization and
'Regulations of the several parties hereto, save in so far as is
'expressed herein or may be necessary to carry out the true
'purpose and intent hereof; nor to make any party hereto,
'chargeable for the collection of moneys on behalf of the
'employes, members of the respective Relief Funds, or liable
'for the benefits payable to such employes, of any other party
'to this agreement, this union being simply for the purpose
'of administration and economical management, each party
'hereto, in behalf of itself and its employes, agreeing to ap-
'propriate its ratable proportion of the joint expenses of
'administration and management, and the entire outlay
'necessary to make up deficits for benefits to its own em-
'ployes.

"FOURTH, That none of the parties hereto shall, during
'the continuance of this agreement, make any change in
'either the Organization or Regulations, as now existing,

"save only subject to the approval and adoption thereof, by "each of the other parties hereto.

"FIFTH, That for convenience of designation, the joint "operations of the said Relief Departments shall be conducted "under the title of 'The Pennsylvania Railroad Voluntary "Relief Department,' all applications by employes, and the "agreements therein made being, however, to and with the "Company in whose service the applicants shall be.

"SIXTH, That any party hereto may withdraw from this "agreement at any time after three years from the date hereof "upon three months' written notice to the other parties of "their purpose so to do. This agreement shall, however, con- "tinue in full force and effect as to parties hereto not with- "drawing, so long as there shall remain two or more such "Companies, and the Advisory Committee thereafter shall "consist of the members chosen and to be chosen by the "remaining parties to the agreement and their employes, "as herein provided, in addition to the *ex-officio* member.

"*In Witness Whereof*, The said parties hereto have placed "their corporate seals, duly attested, the day and date above "written." [*Here follow signatures.*]

The "West Jersey & Seashore Railroad Company," successor by consolidation and merger of the "West Jersey Railroad Company" and the "Camden & Atlantic Railroad Company," effective May 4th, 1896, has become substituted for said last two mentioned Companies.

The "Philadelphia, Baltimore & Washington Railroad Company," successor by consolidation and agreement of the "Philadelphia, Wilmington & Baltimore Railroad Company," effective November 1st, 1902, has become substituted for the latter Company.

"*Memorandum of Agreement* made this
"day of , Anno Domini one thousand nine
"hundred and one, between the Pennsylvania Railroad Com-
"pany, the Northern Central Railway Company, the West
"Jersey & Seashore Railroad Company, and the Philadelphia,
"Wilmington & Baltimore Railroad Company, associated by
"agreement in joint administration of their respective Relief
"Departments, under the name of The Pennsylvania Rail-
"road Voluntary Relief Department, parties of the first part,
"and the Pennsylvania Company, the Pittsburgh, Cincinnati,
"Chicago & St. Louis Railway Company, the Grand Rapids
"& Indiana Railway Company, the Terre Haute & Logansport
"Railway Company, the Cincinnati & Muskingum Valley
"Railroad Company, the Waynesburg & Washington Railroad
"Company, the Cincinnati, Lebanon & Northern Railway
"Company, and the Wheeling Terminal Railway Company,
"associated by agreement in joint administration of their
"respective Relief Departments under the name of the
"Voluntary Relief Department of the Pennsylvania Lines
"West of Pittsburgh, parties of the second part, *Witnesseth:*

"*Whereas*, All companies associated in joint administration
"of The Pennsylvania Railroad Voluntary Relief Depart-
"ment and all companies associated in joint administration
"of the Voluntary Relief Department of the Pennsylvania
"Lines West of Pittsburgh, are related, by community of
"interest, in such manner as would have justified an asso-
"ciation in a single joint administration of the Relief De-
"partments of the several companies already associated in the
"two Voluntary Relief Departments hereinbefore named,
"and, had they so associated, the result would have been,
"under their regulations as respectively adopted, that em-
"ployes members of the Relief Fund of any one of such
"companies, transferred to the service of any other of such
"companies, would, as incident to such transfer, become
"members of the Relief Fund of the Company to whose ser-
"vice they were transferred;

"*And Whereas*, It is desirable that such joint administra-
"tion of The Pennsylvania Railroad Voluntary Relief De-
"partment and such joint administration of the Voluntary

"Relief Department of the Pennsylvania Lines West of "Pittsburgh should continue, but that the employes mem- "bers of the Relief Fund of any of the companies associated "in joint administration of either of said Voluntary Relief "Departments should have all the advantages with respect "to change of service which would have resulted had there "been but a single joint administration of both Departments:

"*Now, Therefore*, In consideration of the premises, it is "hereby agreed between the parties hereto, in order to accom- "plish this result:—

"FIRST, That the parties of the first part will amend Regu- "lation No. 17 of the Regulations of their respective Relief "Departments by inserting after the second paragraph the "following words:

"Any employe, who shall have been transferred from the "service of any of the Companies associated in joint adminis- "tration of the Voluntary Relief Department of the Pennsyl- "vania Lines West of Pittsburgh and shall at the time of such "transfer be a member of the Relief Fund of any of the Com- "panies associated in the joint administration of the Volun- "tary Relief Department of the Pennsylvania Lines West "of Pittsburgh, may, regardless of age or physical condition, "and upon making the necessary application, become a mem- "ber of the Relief Fund of the Company to the service of "which he may be transferred, in the class and for the addi- "tional death benefits, at the same rates, for which he shall "have been contributing at the time such transfer is made; "provided, that such application is made within thirty days "from the time of such transfer to the service of the Company, "the Relief Fund of which he desires to become a member.

"SECOND, That the parties of the second part will amend "Regulation No. 17 of the Regulations of the Voluntary "Relief Department of the Pennsylvania Lines West of "Pittsburgh by inserting after the second paragraph the "following words:

"Any employe, who shall have been transferred from the "service of any of the Companies associated in the joint "administration of The Pennsylvania Railroad Voluntary "Relief Department and shall at the time of such transfer

"be a member of the Relief Fund of any of the Companies "associated in the joint administration of The Pennsylvania "Railroad Voluntary Relief Department, may, regardless of "age or physical condition, and upon making the necessary "application, become a member of the Relief Fund of the "Company to the service of which he may be transferred, in "the class and for the additional death benefits, at the same "rates, for which he shall have been contributing at the "time such transfer is made; provided, that such application "is made within thirty days from the time of such transfer "to the service of the Company, the Relief Fund of which "he desires to become a member.

"THIRD, That none of the parties hereto shall, during the "continuance of this agreement, make any change in that "portion of their respective regulations hereinbefore agreed "to be amended, save only subject to the approval and "adoption thereof by each of the other parties hereto.

"*In Witness Whereof*, The said parties have caused their "respective corporate seals to be hereunto affixed, duly "attested, the day and year hereinbefore written."

[*Here follow signatures.*]

The "Philadelphia, Baltimore & Washington Railroad Company," successor by consolidation and agreement of the "Philadelphia, Wilmington & Baltimore Railroad Company," effective November 1st, 1902, has become substituted for the latter Company.

PENNSYLVANIA RAILROAD COMPANY.

RELIEF DEPARTMENT.

REGULATIONS.

GENERAL.

1. The "Relief Department" is a Department of the Company's service in the executive charge of a Superintendent, whose directions in carrying out its regulations are to be complied with, subject to the control of the General Manager.

2. In these regulations, unless otherwise indicated, the titles "Company," "Board of Directors," and "General Manager," will be understood as meaning the Pennsylvania Railroad Company and the Board of Directors and General Manager of that Company.

3. The object of this Department is the establishment and management of a Fund to be known as "The Relief Fund," for the payment of definite amounts to employes contributing to the Fund, who under the regulations shall be entitled thereto, when they are disabled by accident or sickness, and in the event of their death, to the relatives or other beneficiaries specified in the applications of such employes.

4. The Relief Fund, from which the proposed benefits are to be paid, will be formed by voluntary contributions from employes; appropria-

tions, when necessary to make up any deficit, by the Company; and income or profit derived from investments of the moneys of the Fund and such gifts or legacies as may be made to the Company for the use of the Fund.

5. The Company will take general charge of the Department; guarantee the fulfillment of the obligations assumed by it in conformity with the regulations from time to time established; take charge of the funds, and be responsible for their safe-keeping; supply the necessary facilities for conducting the business of the Department, and pay all the operating expenses thereof.

6. There shall be an Advisory Committee constituted as follows:—

The General Manager shall be *ex-officio* a member and Chairman, and the Superintendent Secretary, of the Committee.

The other members of the Committee shall be members of the Relief Fund, and shall be chosen in the month of November, to serve from the first day of January next succeeding, for the periods hereinafter stated, and until their successors are chosen, as follows:—

By the contributing employes of the Pennsylvania Railroad Division, from among themselves, one member;

By the contributing employes of the United Railroads of New Jersey Division, from among themselves, one member;

By the contributing employes of the Philadelphia & Erie Railroad Division, from among themselves, one member;

By the contributing employes of the Buffalo & Allegheny Valley Division, from among themselves, one member;

And by the Board of Directors of the Pennsylvania Railroad Company, four members.

Members of the Committee chosen in the month of November, 1904, shall be chosen to serve as follows:—

One chosen by the contributing employes of the Pennsylvania Railroad Division and one of those chosen by the Board of Directors of the Pennsylvania Railroad Company, to be designated by said Board, for the period of three years.

One chosen by the contributing employes of the United Railroads of New Jersey Division, and one chosen by the Board of Directors of the Pennsylvania Railroad Company, to be designated by said Board, for the period of two years.

Those chosen by the contributing employes of the Philadelphia & Erie Railroad Division and the Buffalo & Allegheny Valley Division and two of those chosen by the Board of Directors of the Pennsylvania Railroad Company, to be designated by said Board, for the period of one year.

The successors of the members chosen as before mentioned shall be chosen to serve for the period of three years respectively.

The members selected by the contributing employes shall be chosen by ballot, the vote being taken and certified under oath by tellers selected by the Advisory Committee. Each member of the Relief Fund shall be entitled to cast one vote.

To fill vacancies occurring on the Advisory Committee, the members to represent the contributing employes shall be designated by the General Manager, and the members to represent

the Company shall be chosen by the Board of Directors, such members to serve until their successors are duly chosen as above.

If a member of the Committee shall cease to be employed by the Company or upon the road or division for which he has been chosen, or shall for any reason cease to be a member of the Relief Fund, he shall cease to be a member of the Committee.

Should any other corporation or corporations associated in interest with this Company, adopt or have adopted, regulations establishing Relief Departments similar to the one hereby established, this Company shall have power to associate itself with such corporation or corporations in the administration of the Relief Departments hereby and thereby established, when so authorized by the respective Boards of Directors of this and said corporation or corporations; and in such event there shall be but a single publication of the regulations so adopted, for all the Companies so associated, which shall be for and in the name of the Pennsylvania Railroad Company, and in applying the said regulations to any other Company and its employes, it shall be understood that such Company, its Board of Directors, officers and employes, and the members of its Relief Fund, are referred to instead of the Pennsylvania Railroad Company, its directors, officers and employes and the members of its Relief Fund, as printed, excepting as to the number of members to be

chosen for the Advisory Committee, which shall be for each Company as shall be provided in the agreement relating thereto.

Such association shall be evidenced by agreement or agreements duly executed, authorizing, among other things, the constitution of a Joint Advisory Committee, to be chosen, as and in the manner therein prescribed, by the several parties thereto, and their employes, either by separate action in behalf of each of said parties, or by the united action of two or more of them as to any member or members of said Committee; the original committee to be constituted and vacancies occurring thereafter to be filled, in such manner as shall be prescribed.

In the event of any association as aforesaid, the functions and powers herein given to and vested in the Advisory Committee created as hereinbefore provided, shall, during the continuance of said agreement or agreements, be transferred to and vested in the Advisory Committee constituted as prescribed in said agreement or agreements, chosen as therein directed, and so much of the Organization and Regulations of the Relief Department herein provided for, as relates to the constitution of an Advisory Committee consisting solely of officers and employes of this Company, shall be suspended, with the understanding, however, that upon the determination of such agreement or agreements, the Advisory Committee herein provided for, constituted as herein pre-

scribed, shall reassume the functions and duties herein committed to it.

7. The Advisory Committee shall have general supervision of the operations of the Department, and see that they are conducted in accordance with the Regulations.

The Committee shall make by-laws for its government, not inconsistent with these Regulations, and arrange for the methods of choosing its members by contributing employes.

The Committee shall hold stated meetings once in three months, at such time and place as they shall determine, and shall meet at other times at the call of the General Manager as Chairman.

It shall be the duty of the Chairman to call special meetings of the Committee upon the written request of three of its members.

8. The Superintendent shall have general charge of all the business pertaining to the Department and prescribe the forms and blanks to be used and the reports to be made to the Department.

He shall certify to the correctness of all bills, and check-rolls for employes, of the Department, and send them to the General Manager for approval.

He shall employ, with the approval of the General Manager, such persons as may be necessary for the proper conduct of the business of the Department.

He shall furnish to the Advisory Committee such reports as they may require.

He shall be aided by an Assistant Superintendent who shall, in the absence of, or when specially directed by, the Superintendent, act for him, and the fact of such action in any case shall be prima facie evidence of his authorization so to act.

9. Medical Examiners shall be employed, who, under the direction of the Superintendent of the Relief Department, shall be stationed as may be from time to time arranged. One shall be Chief Medical Examiner and act as the adviser of the Superintendent with respect to medical matters, and perform such duties as may be assigned him.

Medical Examiners shall make the required physical examinations and prepare applications; ascertain and report upon the condition of members reported sick or injured, and decide as to the character of their disablements and their fitness for duty; prepare claims for benefits; and perform such other duties as may be required of them by the Superintendent of the Relief Department. The Medical Examiners shall not personally give surgical or medical attendance excepting in emergencies, and shall not accept fees for such attendance.

10. The moneys received for the Relief Fund shall be held by the Company in trust for the Relief Department. The Advisory Committee shall direct the investment, and any changes therein, of money which is not required to be kept on hand for current use.

The Company being the Trustee and Guarantor of the Fund, the investments shall be in such securities as shall have been approved by the Board of Directors, and shall be in the name of the Company, "in trust for the Relief Department."

On January 1st, 1904, all moneys to the credit of the first five triennial periods, known as the Relief Fund Liability Account, shall be transferred to a fund known as the Superannuation Fund, and liabilities incurred in those periods in addition to those of the sixth triennial period shall be paid out of the balance to the credit of the sixth triennial period; and it is also provided that at the end of each successive period of three years, all moneys to the credit of the Relief Fund Liability Account shall be placed in the Superannuation Fund as above, and all liabilities incurred shall be paid out of the balance to the credit of the next period, provided that if the amount contributed by the members of the Fund and received from other sources, during any one of the triennial periods prior to January 1st, 1904, or any one of the successive periods of three years thereafter, should not be sufficient to meet the liabilities incurred for such period, the Company will pay the deficiency. The interest on the Relief Fund Surplus shall also be placed in the Superannuation Fund.

Should the Superannuation Fund be insufficient to meet the payment of the allowances authorized

by the Regulations, the Company will pay the deficiency up to but not beyond January 1st, 1907. If there should be a balance to the credit of this fund on January 1st, 1907, or at the end of any three-year period thereafter, such balance shall be transferred to the Relief Fund Surplus.

11. The fiscal year of the Relief Department shall begin with the first day of January of each year.

12. The condition of the Relief Fund at the close of each fiscal year shall be audited and reported on by a competent person or persons, selected for that purpose by those members of the Advisory Committee who are chosen to represent the members of the Relief Fund.

13. Amendments to the Regulations of the Relief Department may be proposed by the Advisory Committee, but such shall not be operative unless presented at a stated meeting of the Committee, and considered and adopted at a subsequent stated or special meeting by a majority of the whole Committee and approved by the Board of Directors. Amendments so approved shall be duly announced by the Chairman of the Advisory Committee, and shall be binding upon the Company and the members of the Relief Fund from the dates fixed in the resolutions approving the same.

MEMBERSHIP.

14. Those who, under the Regulations, become contributors to the Relief Fund with the right of

participating in its benefits, must be employes of the Company, and shall be known as "Members of the Relief Fund."

15. In referring to the employes of the Company, the expressions "service" and "in the service," will refer to employment upon or in connection with, any of the railroads or works the employes of which shall be admitted to membership in this Relief Fund, or in either of those associated in administration therewith, and the service of any employe shall be considered as "continuous" from the date from which he has been continuously employed, without interruption, upon or in connection with, either of such railroads or works, or two or more of them successively.

16. There shall be five classes in which employes may become members, to be determined by their regular monthly pay or usual earnings in a month, as follows:—

1st Class—Those at any rate of pay.
2d Class—Those receiving thirty-five dollars or more.
3d Class—Those receiving fifty-five dollars or more.
4th Class—Those receiving seventy-five dollars or more.
5th Class—Those receiving ninety-five dollars or more.

Unless the usual amount of earnings in a month can be otherwise ascertained it will be determined by multiplying the usual earnings per day by twenty-six.

For persons in the service of two or more of the Companies associated in the administration of their Relief Departments, the class shall be

determined by the total pay received from all such Companies, and the membership shall be in the Fund of the Company from which the largest amount is received.

In cases of doubt as to the proper classification, the Superintendent of the Relief Department shall decide.

17. No employe will be required to become a member of the Relief Fund.

Any employe not over forty-five years of age may, upon passing a satisfactory physical examination, become a member in the class which his pay entitles him to enter or any lower class.

Any employe, who shall have been transferred from the service of any of the Companies associated in the joint administration of the Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh and shall at the time of such transfer be a member of the Relief Fund of any of the Companies associated in the joint administration of the Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh, may, regardless of age or physical condition, and upon making the necessary application, become a member of the Relief Fund of the Company to the service of which he may be transferred, in the class and for the additional death benefits, at the same rates, for which he shall have been contributing at the time such transfer is made; provided, that such application is made within thirty days from the time of such transfer to the service of the Company,

the Relief Fund of which he desires to become a member.

Any member may, upon passing a satisfactory physical examination, change to a class higher than that in which he is contributing, if not higher than that determined by his pay, or, without such examination, to any lower class.

Any member not over forty-five years of age, who shall have been continuously in the service for five years, and a member of the Relief Fund for one year, both immediately prior to his supplementary application, may enter any class higher than that determined by his pay upon passing a satisfactory physical examination.

Statements made to Medical Examiners by applicants respecting their physical condition, in connection with applications for membership, higher class or additional death benefit, and attached thereto, shall form a part of the same.

For an applicant not a minor the age shall be taken as that at nearest birthday.

18. Any employe at the time of entering any class as a member of the Relief Fund, or thereafter may, upon passing a satisfactory physical examination, take one or more additional death benefits of the first class to such extent that the whole amount of additional death benefit for which he shall at any time contribute shall not exceed the amount of the death benefit of the class in which he shall at the time be a member. Under this a member in the first class may take one additional death benefit of the first class; in

the second class, two or less; in the third class, three or less; in the fourth class, four or less; and in the fifth class, five or less. If a member shall at any time enter a lower class he shall not be entitled to retain additional death benefit of an amount greater than the death benefit of such lower class.

A member may, on application, relinquish any of the additional death benefits for which he is contributing.

Physical examination shall not be required on application for reduction of additional death benefit, nor for additional death benefit in connection with reduction in class if the whole death benefit is not thereby increased.

19. Any member may withdraw from the Relief Fund at the end of any month on giving notice on or before the twenty-fifth day of such month on the prescribed form, which can be obtained from the person under whom he is directly employed. The obligations and rights in connection with the Fund, of members giving such notice, shall cease at the close of the month in which the notice is given, and no contribution shall be made by any such withdrawing member for the succeeding month.

20. In indicating the relations to the Company's service of employes relieved of employment and pay therein, the following terms shall be used:—

"Left Service" for those who have resigned, or have been relieved or discharged;

"Furloughed" for those temporarily relieved without fault on their part;

"Suspended" for those temporarily relieved as a penalty for offences;

"Retired" for those retired from active service, with Superannuation allowance.

21. Membership may be retained during absence from duty by reason of furlough or suspension, for a period not longer than nine months, under the following conditions:—

Membership shall cease unless the member shall return to duty at or before the expiration of such period or upon recovery from disability then existing.

After the usual contribution immediately prior to such absence, further contribution for time during such absence shall be optional with the member. If he shall have omitted to contribute at any time during such absence, any subsequent contribution shall commence with the date of payment or such later date as the member shall designate, but not later than the first day of the following month, and shall be paid to the end of the month to which it applies, but contribution during such absence shall not be accepted for any time beyond the period of nine months aforesaid.

Contribution for any portion of the period of such absence shall not be received from a member at the time disabled, or if received shall be returned.

There shall be no title to benefits on account of disability commencing during such absence, in time not contributed for in advance, nor for death during such time or in connection with such disability. Such disability, or any disability terminating before the expiration of the aforesaid period of nine months, shall not operate to extend the period during which membership may be retained during absence as herein provided.

Return to duty shall be held to be at the expiration of the above-named period if it shall be on the first day after such period, or on the day following if the member cannot return to duty on such first day on account of its being a Sunday or legal holiday.

APPLICATIONS.

22. Participation in the benefits of the Relief Fund must be based upon an application by the proposed member, in the form prescribed in Regulation No. 23, approved by the Superintendent of the Relief Department, and upon a certificate of membership issued by him to the applicant.

23. Applications for membership shall be in the following form:—

PENNSYLVANIA RAILROAD COMPANY.
RELIEF DEPARTMENT.

APPLICATION FOR MEMBERSHIP IN THE RELIEF FUND.

To the Superintendent of the Relief Department:

I, of , in the county of and State of employed in the service of the Pennsylvania Railroad Company, as upon the Department, do hereby, by reason of such employment, apply for membership in the

Relief Fund, and consent and agree to be bound by the Regulations of the Relief Department of the said Company, as contained in the book of said Regulations, approved by the Board of Directors, which I have read or have had read to me, and by any other regulations of the said Department hereafter adopted, and by the provisions of any agreement or agreements made by the said Company with any other corporation or corporations associating in administration of their respective Relief Departments, in accordance with said book of Regulations.

I also agree, That the said Company, by its proper agents, and in the manner provided in said Regulations, shall apply as a voluntary contribution from any wages earned by me under said employment, or from benefits that may hereafter become payable to me, at the rate of per month, for the purpose of securing the benefits provided for in the Regulations for a member of the Relief Fund of the class, and additional death benefit, equal to the death benefit of the first class. Unless I shall otherwise designate in writing, with the approval of the Superintendent of the Relief Department, death benefit shall be payable to

[*Here designate the beneficiary or beneficiaries.*]

And if any person now or hereafter designated by me to receive the death benefit shall not be living or shall be incapacitated for executing the requisite receipt and release, or if there shall be no such person, the death benefit shall be payable as provided in the Regulations of the Relief Department for such event. And I agree that the acceptance of benefits from the said Relief Fund for injury or death shall operate as a release of all claims for damages against said Company, arising from such injury or death, which could be made by or through me, and that I or my legal representatives will execute such further instrument as may be necessary formally to evidence such acquittance.

I also agree, That this application, when approved by the Superintendent of the Relief Department, shall make me a member of the Relief Fund on and from the date upon which by the provisions of the Regulations and the terms of this application, it takes effect, and shall constitute a contract between myself and the said Company, and that the terms of this application and the Regulations of said Department shall, during my membership, be a part of the conditions of my employment by the Company, and that the same shall not be avoided by any change in the character of my service, or locality where rendered, while in such employment, nor by any change in the amounts applicable from my wages to the Relief Fund, which I may hereafter consent to, and that the agreement that the above-named amounts shall be appropriated from my wages shall apply also to any other amounts arising from changes made as aforesaid and shall constitute an appropriation and assignment in advance, to the said Company in trust, for the purposes of the Relief Fund, of such portions of my wages, which assignment shall have precedence over any other assign-

ment by me of my wages, or of any claim upon them on account of liabilities incurred by me.

I also agree, for myself, and those claiming through me, to be especially bound by Regulation numbered 65, providing for final and conclusive settlement of all disputes, by reference to the Superintendent of the Relief Department and an appeal from his decision to the Advisory Committee.

I certify, That I am correct and temperate in my habits; that so far as I am aware I have no injury or disease, constitutional or otherwise, which will tend to shorten my life, and am now in good health and able to earn a livelihood.

I also agree, That any untrue or fraudulent statement made by me to the Medical Examiner, or any concealment of facts in this application, or resignation from the service of the said Company or my being relieved from employment and pay therein at the pleasure of the Company or its proper officers, shall forfeit my membership in the aforesaid Relief Fund and all benefits, rights or equities arising therefrom, excepting that my leaving the service shall not (in the absence of any of the other foregoing causes of forfeiture) deprive me of any benefits to the payment of which I shall have previously become entitled by reason of accident or sickness occurring while in the service.

This application to take effect the day of , A. D. , if I shall be on duty on that date; otherwise upon the date of my going on duty thereafter.

In Witness Whereof, I have signed these presents at in the county of State of this day of A. D. .

Witness: (Signature.)

The foregoing application is approved at the office of the Superintendent of the Relief Department at in the county of State of this day of A. D. .

(Signature.)

Superintendent of the Relief Department.

The last application which shall have been made by any one in the foregoing form, or in the corresponding form prior to any modifications since adopted, shall be known as his principal application.

The following form of supplementary application shall be used for members applying to enter higher or lower classes, or for additional death benefit or reduction therein.

PENNSYLVANIA RAILROAD COMPANY.

RELIEF DEPARTMENT.

SUPPLEMENTARY APPLICATION.

To the Superintendent of the Relief Department:

I, of in the county of , State of an employe in the service of the Pennsylvania Railroad Company and a member of the Relief Fund thereof, by virtue of my former principal application under and subject to the conditions recited in said principal application and upon the terms thereof, unless, and only so far as, herein modified, do hereby make this supplementary application for the following, namely:—

[*Here specify character of benefits applied for.*]

This application to take effect the day of , A. D. if I shall be on duty on that date; otherwise upon the date of my going on duty thereafter.

In Witness Whereof, I have signed these presents at in the county of State of this day of A. D. .

Witness: (Signature.)

The foregoing supplementary application is approved at the office of the Superintendent of the Relief Department at in the county of State of this day of A. D. .

(Signature.)

Superintendent of the Relief Department.

24. When a member of the Relief Fund of either of the Companies which may be for the time being associated in the joint administration of their Relief Departments, shall be permanently transferred to the service of any other of those Companies, his membership shall by virtue thereof be transferred to the Relief Fund of such other Company, and his application and agreement as a member of the Relief Fund of the Company from whose service he is transferred shall thereupon become binding between such member and the Company to whose service he is transferred.

25. Immediately upon any one engaged in, or about to enter, the service of the Company, and

not over forty-five years of age, signifying a desire to become a member of the Relief Fund, or upon a member signifying a desire to take additional death benefit or to change his class or death benefit, notice of the same shall be sent from the proper employing officer in the manner required, to the Superintendent of the Relief Department, and to the proper Medical Examiner. The latter will as soon thereafter as possible make the necessary inquiries of the applicant, and physical examination, when such is required, complete the application, and forward it to the Superintendent of the Relief Department, who will advise the proper employing officer, and through him the applicant, of the approval or non-approval of the application.

Medical Examiners shall not make known to applicants or others the results of physical examinations, excepting as may be authorized.

26. Applications shall take effect on the dates specified therein, excepting as to persons not on duty in the service of the Company, in which cases they shall take effect at any subsequent dates upon which the applicants go on duty and are not at the time suffering from injury or disease.

If the specified date is a Sunday or legal holiday, on which the applicant is not on duty, the application shall nevertheless take effect on that date if by being on duty on the working days immediately before and after such date he shall be shown not to be disabled.

27. The date specified for an application to take effect shall be the date on which the request is made, unless the applicant, with such request, shall specify in writing a later date, which shall not be later than the first day of the next month.

28. An applicant may, in his principal application or subsequently in the prescribed form, designate a beneficiary or beneficiaries, who shall, upon the approval of the designation by the Superintendent of the Relief Department, be entitled to receive his death benefit; provided that good and sufficient reasons must be given for such designation of other than relatives or legal representatives.

29. Payment of benefit on account of death of a member shall be made in the following order :—

First. To the beneficiary or beneficiaries designated in the member's principal application, or subsequently in the prescribed form, whose designation shall have been approved by the Superintendent of the Relief Department, and, where there are more than one such beneficiary, in equal shares, unless otherwise specified.

Second. If there be no such designated beneficiary living at the member's death, then the whole benefit; or, if there be several designated beneficiaries, and one or more thereof shall be then dead and one or more be then living, then the share or shares of such whole benefit as the deceased beneficiary or beneficiaries would have been entitled to receive, if any, shall be paid to the wife (or husband) of the member.

Third. If there be no wife (or husband) of such member living at the member's death, then the whole benefit, or share or shares thereof, which such wife (or husband), if living, would have been entitled to receive, shall be paid to the child or children of the member, and the issue of any deceased child, in equal shares and proportions, the issue of such deceased child, however, to take only among them the share such deceased child would have taken if living; and said share shall be divided, distributed and paid to and among such issue, so as that they shall receive the same in the like shares and proportions as they would have been entitled to as heirs-at-law of such deceased child, according to the statute of distribution of the State wherein the deceased member was domiciled at the time of death, had such deceased child died seized and possessed of the same intestate.

Fourth. If there be no children of the member or the issue of such living, then the whole of such benefit, or the share which such children and issue would have taken had there been such, shall be paid to the father and mother of the member, jointly, or to the survivor of them.

Fifth. If there be no such person in existence as hereinbefore enumerated, the next of kin of the member shall be entitled to such benefit, in accordance with the statute of distribution of personal estates of the State wherein said member was domiciled at the time of death, and payment thereof shall be made to the executor or

administrator of the deceased member, in trust, nevertheless, solely for the benefit of, and distribution among, such next of kin accordingly.

Sixth. If there be no kindred of the member living at such member's death, the benefit shall lapse, and the amount thereof shall remain as part of the Relief Fund; but so much thereof as may be requisite for the necessary funeral expenses and proper expenses incident to the disability and death of the member shall, in such case, be paid from the Relief Fund. But in any case in which notice in writing of the existence of such kindred shall not be served on the Superintendent of the Relief Department within twelve months after such member's death, it shall be treated as conclusive that there are no such kindred in existence, and thereupon the said benefit shall be treated as absolutely lapsed and extinguished, and dealt with accordingly.

The designation of a person to receive the death benefit in trust for a minor child shall be presumed to last only during minority, unless otherwise provided in the designation.

30. Unless otherwise directed by the Superintendent of the Relief Department, an application of a married woman must be signed also by her husband, and that of a minor by the father or other legal guardian.

CONTRIBUTIONS.

31. The word "contribution," wherever used herein, shall be held to mean such portion of wages

or benefits, or cash payments in lieu thereof, as a member shall have agreed in his application shall be applied for the purpose of securing to him the right to benefits from the Relief Fund, and the words "contributors," "contributing employes" and like words and phrases are descriptive of employes so contributing.

32. Contributions shall be made monthly in advance, at the following rates. For the first class, seventy-five cents per month; for the second class, twice as much ($1.50); for the third class, three times as much ($2.25); for the fourth class, four times as much ($3.00); and for the fifth class, five times as much as for the first ($3.75).

33. Contribution to be collected or refunded for part of a month shall be one-thirtieth part of the rate per month, for each day, adding to make even cents where fractions occur. For such contribution to be collected the time shall begin with the date upon which an application takes effect or contribution for other reason begins, and shall extend to the end of the month. Contribution to be refunded shall be for the time, after and including the last day of service, for which contribution has been made.

34. The rates per month of contributions for death benefit only, additional to the death benefit of a member's class, shall be determined by the age of the member at the time of taking the additional death benefit, as follows:—

For each additional death benefit of the first

class, for a member not over forty-five years of age, thirty cents; over forty-five and not over sixty years of age, forty-five cents; and over sixty years of age, sixty cents. If a member having additional death benefit shall increase the amount when his age requires a higher rate than he before contributed, the higher rate shall apply only to the increase.

35. Contribution for a whole month shall be payable before the first day of such month. It will ordinarily be deducted from the member's wages on the pay-roll of the preceding month and placed to his account in the Relief Fund.

If a member on duty becomes entitled to benefits before opportunity to earn wages to pay his full contribution, the amount payable shall be deducted from benefits, unless otherwise paid. When, in other cases, wages earned are not enough to pay the full contribution which should be deducted therefrom, the deficiency must be paid in cash, unless wages from which it may be deducted are earned in time.

When, through error in computation, a contribution is not the correct amount for the period for which it is payable or to which it is intended to apply, any deficiency shall be deducted from wages or benefits, or otherwise paid, and any excess shall apply to so many full days of time succeeding such period as it will cover.

Contribution shall not be received for past time during which a member would not have been en-

titled to benefits by reason of failure to contribute in advance, nor from a member suffering from disability commencing in such time, and any such contribution paid shall be returned.

Upon change of class or death benefit, contribution shall be at the old rate for time prior to date of change and at the new rate from such date inclusive.

36. When an application is to take effect upon the first day of a month, the contribution for that month shall be made on the roll of the preceding month, if practicable. Otherwise the contribution for a month or any unexpired part of a month in which an application takes effect, or for which a member should contribute who goes on duty after absence, shall be made on the roll of that month, together with the contribution for the next month.

37. A member who earns no wages in a month, from which his contribution may be made for the next month, shall not be entitled to benefits on account of disablement or death occurring in the next month, nor for death following such disablement, unless he shall have earned wages in such month from which his contribution may be deducted, or shall have otherwise made the proper contribution in advance for the time in which the disablement or death occurs.

38. When a member is disabled or dies in the month in which his application takes effect, his contribution for that month will be deducted from the wages earned therein or from the

benefits payable if the wages are not sufficient, and the amount of contribution shall be for the unexpired part of the month, commencing with the date upon which the application takes effect.

39. A member shall not make contribution for any time after the month in which the disability begins, when such disability is properly established, except when wages are paid for time during disability, in which case contribution shall be made for such time, and for intervening Sundays and legal holidays.

40. No contribution shall be deducted from the final payment of wages to a member leaving the service, excepting for contributions in arrears. When a member leaves the service who is not at the time suffering from disability which entitles him to benefits, there shall be returned to him so much of his last contribution as covers the part of the month succeeding and including the date on which he leaves the service, for which he must give a receipt in the prescribed form.

Should a member, who is disabled and entitled to benefits when leaving the service, recover from the disability in the same month, he shall not be entitled to benefits for a subsequent disability or death, and shall be entitled to the return of so much of his contribution as covers time subsequent to such recovery.

41. No part of the contribution of a member for a month in which he dies shall be refunded.

BENEFITS.

42. Members shall be entitled, upon the conditions prescribed in the Regulations, and commencing with membership, to the following benefits:—

ACCIDENT.—Payments while disabled by accident in the Company's service, for each day during a period not longer than fifty-two weeks, at the rate of fifty cents per day for a member of the first class, and of greater amounts for members of the other classes, in proportion to their contributions; and at half these rates after fifty-two weeks and during the continuance of the disability.

SICKNESS.—Payments while disabled by sickness or by injury other than accident in the Company's service, for each day after the first three days of such disability, and for a period not longer than fifty-two weeks, at the rate of forty cents per day for a member of the first class, and of greater amounts for the other classes, in proportion to their contributions for such classes, and after fifty-two weeks at half the foregoing rates.

DEATH.—A payment, on the death of a member from accident or other cause, occurring during time for which he shall have contributed, or while receiving disablement benefits, or during a month in which he shall have recovered from disability, of two hundred and fifty dollars for a member of the first class, and of greater amounts for the other classes, in proportion to their contributions.

SURGICAL ATTENDANCE.—Provision for neces-

sary surgical attendance during disability from accident occurring to members while in the discharge of duty as employes of the Company.

PERIODS OF DISABLEMENT.—In ascertaining the periods for which disablement benefits may be paid, successive periods of disability from accident in the service shall be counted together if arising from the same accident, and separately if from different accidents. Successive periods of disability from sickness shall be counted together, with the three days deduction from the first only, if they are separated by an interval of less than thirteen weeks, and separately with the three days deduction from each, if the interval is thirteen weeks or more. In determining the length of intervals between periods of disability from sickness any part of the same during which disability from accident exists, shall be excluded.

If a member, after receiving for fifty-two weeks the payments herein provided for disability from sickness, whether continuously or in several periods, not separated by intervals of more than thirteen weeks, shall be declared by the Medical Examiner able to return to duty, he shall resume full contribution, and shall be entitled to payments for disability from accident occurring thereafter in the Company's service, and to payments for disability from sickness occurring after he shall have been continuously engaged in the performance of duty with full contribution for a period of thirteen weeks, or if again disabled by sickness within thirteen

weeks, after receiving benefits for fifty-two weeks as aforesaid, he shall be entitled to payments for sickness benefits at half the rate provided for his class. Such member, and all members while receiving sickness benefits at half the rate of their class, shall retain title to death benefit and shall contribute therefor as follows: for each death benefit of the first class to which the member's class entitles him at the rate for additional death benefit applicable to the age at which he entered the class in which he last contributed, and for his additional death benefit at the rate he last contributed for the same, and the conditions in such case as to contribution and title to death benefit as thereby affected, shall be the same as those applicable in case of furlough.

SUPERANNUATION.—A member who, under regulations adopted by the Company, shall be retired from active service with the Company, by reason of age or physical condition, shall be entitled to Superannuation allowance, provided, however, that he shall not be entitled to receive such allowance for any period for which he may receive wages from the Company, and provided, further, that he shall have relinquished title to disablement benefits, and that acceptance of any Superannuation allowance shall constitute a relinquishment of right or title to such benefits.

The Superannuation allowance of a member shall be determined by multiplying the number of each class in which he shall have been a member by the number of full calendar months

in each class respectively. The sum of the results thus obtained shall be the rate in cents of monthly allowance, provided that, should the fund devoted by these Regulations to the payment of Superannuation allowances—together with any voluntary contributions especially made to said purpose—be inadequate, during any annual or semi-annual period, to meet the demands for such allowances as hereinbefore prescribed, then a pro rata reduction shall be made in such allowances for each such period.

A member receiving such allowance may retain title to death benefits by contributing therefor at the rates prescribed for title to death benefits retained after fifty-two weeks benefits for sickness.

43. The following table exhibits the rates of monthly pay admitting to the several classes and the rates of contributions and benefits:—

	1st Class.	2d Class.	3d Class.	4th Class.	5th Class.
Monthly pay	Any Rate.	$35 or more.	$55 or more.	$75 or more.	$95 or more.
Contribution per month:—					
Class	$0 75	$1 50	$2 25	$3 00	$3 75
Additional Death Benefit, equal to Death Benefits of class:—					
Taken at not over 45 years of age	30	60	90	1 20	1 50
Taken at over 45 years and not over 60 years of age	45	90	1 35	1 80	2 25
Taken at over 60 years of age	60	1 20	1 80	2 40	3 00
Disablement Benefits per day, including Sundays and holidays:—					
Accident.					
First fifty-two weeks	50	1 00	1 50	2 00	2 50
After fifty-two weeks	25	50	75	1 00	1 25
Sickness.					
After first three days, and not longer than fifty-two weeks	40	80	1 20	1 60	2 00
After fifty-two weeks	20	40	60	80	1 00
Death Benefits:—					
For class	250 00	500 00	750 00	1000 00	1250 00
Additional that may be taken	250 00	500 00	750 00	1000 00	1250 00

44. Benefits and other claims upon the Relief Fund shall be paid out in conformity with the financial methods of the Company, and on orders of or bills prepared by the Superintendent of the Relief Department, or such other persons as may be designated by the General Manager.

45. Payments of benefits on account of disablement by accident shall only be made upon the disablement being shown to have resulted solely from accidents occurring to members during and in direct and proper connection with the performance of duty in the service of the Company, to which they are assigned, or which they are directed to perform, by proper authority, or in voluntarily protecting the Company's property or interests, or from accidents occurring to members at points upon the Company's property which they are under the necessity of passing when going to or from work, and when so passing and which result from causes of a nature peculiar to such points and wherein the persons injured do not voluntarily or unnecessarily expose themselves to danger, and there must be a clear and well-established history of the cause and circumstances of injury accidentally inflicted and sufficient to produce the alleged injury, with exterior or other positive evidence of such injury, and satisfactory evidence that it renders the person unable to perform his duty in the service.

If the injury is of a permanent character benefits will cease when the member shall be

declared by the Medical Examiner as able to earn a livelihood in an employment suited to his capacity.

Disablement from accident occurring otherwise than as aforesaid, including such as may arise at any time from acts or things having no proper relation to the performance of duty, or from individual physical condition or tendency, shall be classed as sickness, and if of a permanent character benefits will cease when the member shall be declared by the Medical Examiner as able to earn a livelihood in an employment suited to his capacity.

46. If a member, who has recovered from disability from accident in the Company's service, shall continue disabled from sickness, the time for which benefits are payable shall not be affected by the preceding period of disability from accident.

Benefits shall not be payable for both accident and sickness for the same time.

47. If a member of the Relief Fund shall die during disablement from accident or sickness, the death benefit which may be payable shall not be subject to deduction of previous payments of disablement benefits.

48. A member on duty in the service and earning wages, or having wages payable, from which his contribution may be deducted, shall be entitled to benefits in the event of disablement or death during the time intervening between the

close of a month and payment of his wages earned therein, and also from the date his application takes effect, and from any date upon which, after absence, he returns to duty in a month for which he has not contributed, notwithstanding the fact that his contribution shall not be actually made until the payment of wages from which it is to be deducted. If by reason of disablement or death, or otherwise, he shall be prevented from earning wages enough to pay his contribution, the deficiency shall be otherwise paid. Failure, through error, to deduct a contribution or any part thereof from wages on the roll, shall not debar a member or his beneficiary from the receipt of benefits that would otherwise be payable, but such contribution shall be subsequently deducted on the roll or otherwise paid.

49. An applicant for membership or higher class or additional death benefit, who shall be entitled to the same on condition of passing a satisfactory physical examination, shall make full contribution from the date the application is to take effect, and shall, prior to such examination, possess the rights and be subject to the obligations of membership under the application, as respects accident in the service of the Company occurring after the application is to take effect. If there are no circumstances preventing the approval of the application he shall from the time of passing a satisfactory physical examination be entitled to

membership under the application as respects all the benefits applied for.

The time of passing a physical examination shall be the date of the examination by the Medical Examiner.

When an application is not approved, or the applicant shall have refused to be examined, contribution made on account of the application shall be returned, excepting so much as shall be for time prior to and including the date of recovery from disability from accident in the service, for which benefits shall have become payable or for a month in which death shall occur from such accident.

50. Benefits will not be payable for death or disablement occurring to a member in a foreign country or other place so distant or difficult of access that the Medical Examiner cannot be expected to visit him, unless such death or disablement is promptly reported and satisfactory evidence thereof is furnished, authenticated by consuls or other public officials, or otherwise as may be required.

A member who proposes, while disabled, to go away from his usual place of residence, must first arrange with the Medical Examiner with respect to the proposed absence and the character and frequency of the evidence of continued disability to be furnished, and must keep him advised of his address, and report as may be required to him or to any other Medical Examiner to whom he may be transferred.

51. Members shall not be entitled to receive disablement benefits for time for which wages are paid them by the Company. In computing benefits, the time of disability shall be taken as commencing upon the first day upon which, because of the disability, a full day's wages are not paid, and shall not include any subsequent day for which a half day's wages or more are paid.

52. Benefits shall not be payable for disability from sickness or injuries arising in consequence of intoxication or while intoxicated, or resulting from or prolonged by immoral practices, or the use of stimulants or narcotics, or occurring by reason of incapacity for self-protection arising from such use, or from voluntary self-injury, or while engaged in unlawful acts or in consequence thereof, or from venereal disease.

53. Benefits on account of continued disability will be paid monthly, and for short periods when the amounts are ascertained.

54. Claims for death benefits will be payable within thirty days after the required evidence is furnished of their validity.

A part of a death benefit may be paid before the final settlement, to meet funeral or other urgent expenses incident to the death and preceding disability of a member, to be deducted from the total amount upon final payment; provided that any such payment, without the written authority of the persons to whom the death benefit is payable, shall not exceed one-half the death benefit nor in any case

the sum of two hundred dollars. If any of the persons to whom the death benefit is payable are incompetent to give such authority, or cannot be found, or are in a foreign country, or for other reasons cannot be conveniently communicated with, or there are no such persons living, the Superintendent of the Relief Department may make such payments, as a part of the death benefit, as in his judgment may be reasonable, for the proper burial of the deceased member and the payment of expenses necessarily incident to his death and disability immediately preceding.

55. Benefits payable on account of disability shall be payable only to the disabled member, or to a parent, guardian or trustee entitled to receive and receipt for wages of such member or to act for him.

Such benefits payable to a member unable to execute a proper receipt may be paid to a relative or other proper person, selected by the Superintendent of the Relief Department, to use for the benefit of the member, and the receipt of such person shall be a sufficient discharge.

Disablement benefits remaining unpaid at the death of a member shall be payable to the person or persons entitled to receive the death benefit, and in like proportion.

56. In order that disabled members may have the full benefit of being promptly and frequently seen by the Medical Examiners, it shall be their duty, when their condition and location do not prevent, to call on the Medical Examiners as soon

as practicable after disablement occurs, and at such times thereafter as the Medical Examiners may deem necessary.

Disabled members shall not be entitled to benefits, if they shall decline to permit the Medical Examiners to ascertain their condition, or shall fail to give proper information respecting it, or shall prevent the necessary examination by absenting themselves from home without arranging with the Medical Examiners or giving satisfactory reasons for not doing so, and furnishing the necessary evidence, or shall fail to comply with notice to meet the Medical Examiners at their offices or elsewhere, when their condition and location permit of their doing so.

MISCELLANEOUS.

57. Orders issued by the Relief Department for the payment of disablement benefits will be payable by the Treasurer or the designated depositories of the Company, and Freight and Passenger Agents will cash such orders when properly signed and witnessed, when the funds of the Company in their hands will permit.

For contributions returned, receipts must be taken in the prescribed form and sent to the Superintendent of the Relief Department, who shall reimburse the officers paying them.

Death benefits will be paid by vouchers, which will be cashed by the Treasurer or designated depositories of the Company.

58. Should a member or his legal representative make claim, or bring suit, against the Company, or against any other corporation which may be at the time associated therewith in administration of the Relief Departments, in accordance with the terms set forth in Regulation No. 6, for damages on account of injury or death of such member, payment of benefits from the Relief Fund on account of the same, shall not be made, until such claim shall be withdrawn or suit discontinued. Any compromise of such claim or suit, or judgment in such suit, shall preclude any claim upon the Relief Fund for benefits on account of such injury or death, and the acceptance of benefits from the Relief Fund by a member or his beneficiary or beneficiaries, on account of injury or death, shall operate as a release and satisfaction of all claims against the Company and any and all of the corporations associated therewith in the administration of their Relief Departments, for damages arising from such injury or death.

59. The Superintendent of the Relief Department and the Medical Examiners are to be informed at once, in the manner provided, of accidents or sickness occurring to members.

60. Members who shall be absent from duty on account of sickness or injury must at once notify the persons who keep the record of their time, and they will not be entitled to benefits for time previous to such notice, unless the delay shall be shown to have been unavoidable and satisfactory evidence of disability is furnished.

61. Members must keep their foremen or time-keepers informed of their addresses and of any changes of the same.

62. The responsibility of the Relief Department to any member, and his membership, shall end when he ceases to be employed by the Company, voluntarily or otherwise, excepting as to rights and obligations on account of disability from accident or sickness occurring and reported while in the service and death directly due to such accident or sickness and occurring during the disability arising therefrom, and as to such return of contribution as the member may be entitled to, and as to Superannuation allowance and the conditions relating thereto.

63. When a member leaves the service without Superannuation allowance he must surrender his Certificate of Membership to the person from whom he receives his final payment of wages.

The possession of a Certificate of Membership in the name of a person whose membership or service with the Company has ceased, shall not be evidence of title to benefits.

64. The office of the Superintendent of the Relief Department, with the records thereof, shall be located at such point as shall from time to time be designated by the General Manager, either upon the lines of railroad owned or operated by the Company, or upon lines of railroad owned or operated by any Company with which it may become associated in the administration of the Relief Department.

65. All questions or controversies of whatsoever character arising in any manner, or between any parties or persons in connection with the Relief Department, or the operation thereof, whether as to the construction of language or meaning of the Regulations of the Relief Department, or as to any writing, decision, instruction or acts in connection therewith, shall be submitted to the determination of the Superintendent of the Relief Department, whose decision shall be final and conclusive thereof, subject to the right of appeal to the Advisory Committee within thirty days after notice to the parties interested, of the decision.

When an appeal is taken to the Advisory Committee it shall be heard by said Committee without further notice at their next stated meeting, or at such future meeting or time as they may designate, upon evidence and argument submitted in writing, and shall be determined by vote of the majority of a quorum, or of any other number not less than a quorum of the members present at such meeting, and the decision arrived at thereon by the Advisory Committee shall be final and conclusive upon all parties without exception or appeal.

INDEX.

Absence preventing physical examination, . . . 56
Accident benefits, ... 42, 45
" before application is approved, . . . 49
Additional death benefit, ... 18
Addresses, members inform timekeepers of, . . . 61
Advisory Committee, how constituted, &c., pp. 14–18; Reg. 6, 7
" " proposed amendments, . . . 13
" " decision final, ... 65
Age affecting membership, ... 17
Agreement for joint administration, ... p. 3
Amendments, how made, ... 13
Appeal to Advisory Committee, ... 65
Applications, ... 23, 25
" basis of membership, ... 22
" when to take effect, ... 26
" to be approved by Supt. of Dept., . . 22
" may be dated in next month, . . . 27
Assistant Superintendent, duties of, ... 8
Audit Fund annually, ... 12
Beneficiary, other than relatives, ... 28
" entitled to death benefits, ... 29
Benefits, ... 42, 43
" title to, during furlough or suspension, . . 21
" when payable, without contribution, . . . 48
" effect on, when no wages earned, . . . 37
" for disablement, to whom payable, . . . 55
" before application is approved, ... 49
" not payable while receiving Superannuation allowance, ... 42
" not payable if suit is brought, ... 58
" not payable for time covered by wages, . . 51
" not paid in case of intoxication, &c., . . . 52
" how and when payable, . . . 44, 53, 54, 57
" computing time for, ... 51
" unpaid at death, how payable, ... 55
Certificates of membership, to be issued, . . . 22
" " " surrender on leaving service, 63
Classification of members, ... 16
Company manage Department and guarantee obligations, 5, 10
Contributions, ... 32, 43
" defined, ... 31
" for part of month, ... 33, 38
" for death benefit only, ... 34, 42
" when and how payable, ... 32, 35
" repayment on leaving service, . . 33, 40

Contributions, when no wages earned, ... 37
" for remainder of month after recovery, . 36
" not made by disabled member, . . 39
" none from final payment of wages, . . 40
" return when application not approved, . 49
" returned, receipts to be taken, . . 40, 57
" not refunded at death, ... 41
" for month in which application takes effect, 36
" when disability or death is in month application takes effect, ... 38
" when wages paid during disability, . . 39
Death benefits paid by voucher, ... 57
" additional, ... 18
" not subject to deduction, ... 47
" members receiving Superannuation allowance may retain, ... 42
Disabled members must give notice, ... 60
Declining physical examination, ... 56
Disablement or death in month application takes effect, . 38
Expenses paid by Company, ... 5
Employes' relations to service, terms indicating, . . 20
Furlough, membership kept up during, ... 21
Fiscal year of Department, ... 11
Fraudulent statements, forfeit rights, ... 23
Funeral expenses, payment of, ... 29, 54
Income from investments added to Fund, . . . 4
Investments, how made, ... 10
Joint administration, method of, ... p. 3
Leaving service, responsibility to member ceases, . . 62
Married woman, husband signs application, . . . 30
Medical Examiners, ... 9
" " to be notified of disablement, . . 59
" " to be notified of applications, . . 25
Membership, terms of, ... 14, 16, 17
Minor, father signs application, ... 30
Physical examinations, if declined, benefits not paid, . 56
Service, meaning of, ... 15
Sick disability after accident, ... 46
Suit cancels claim on Fund, ... 58
Superannuation, ... 42
" allowance, how determined, . . . 42
" Fund, how created, ... 10
Superintendent, duties of, ... 6, 8, 65
Surplus, interest thereon to be used for payment of Superannuation allowances, ... 10
Surgical attendance, provided for, ... 42
Suspension, membership during, ... 21
Transfer of membership, . . . pp. 9–11; Reg. 17, 24
Withdrawal from membership, ... 19

121 And thereupon the defendant by its counsel further to maintain the issues upon its part joined, in addition to the foregoing offered to prove by the witness upon the stand, Eden B. Hunt the various payments made by the plaintiff to said relief fund and by said fund to said plaintiff during the time he was a member of said fund, and also the various contributions made to said fund by the defendant and the other considerations moving from said defendant to said fund, the same being offered in bar of the plaintiff's action and not merely for the purpose of proving the amount paid to and received by the plaintiff.

And thereupon the Court rejected said offer, and each and every part thereof, and refused to permit any of said evidence to be given to the jury in bar of the plaintiff's right to recover in this suit; to which ruling and action of the Court the defendant by its counsel then and there duly excepted and said exception was entered at the time upon the minutes of the Court.

And thereupon the defendant by its counsel specifically excepted to the action of the Court in sustaining the plaintiff's demurrer to the defendant's second plea, and also to the rejection by the Court of the aforesaid offer of evidence made in support of the allegations of said plea, and stated the following grounds of exception, to-wit:

1. Because the Act of Congress, approved April 22, 1908, and especially section 5 thereof, is not applicable to this case and to the defense set up and offered to be proved, because said statute
122 was passed more than two years after said relief department contract was made, and section 5 refers to and attempts to strike down only contracts the purpose or intent of which is to exempt carriers from the liabilities created by said act; that said statute has no retroactive effect and cannot be made to cover contracts which were in existence long before its passage and which had no reference to the liabilities thereby created, and especially, contracts which do not tend to exempt the carrier from liability, but simply provide that the acceptance of benefits in accordance with the provisions of the contract will constitute a release.

2. If said act is applicable to this case, that the act is unconstitutional and void for the following, among other reasons:

a. That it is a statute governing liabilities of master and servant; not a statute regulating commerce, and that it does not apply generally to all masters in the District of Columbia and elsewhere, but singles out one class, to wit, common carriers by railroad.

b. That it does not apply generally to all common carriers, but simply strikes at one class of them, to wit, common carriers by railroad, thereby denying to them the equal protection of the law.

c. The act fails to distinguish between employés sustaining injury or suffering death while in the performance of their duties for the carrier, and employés not so engaged, or who may be performing work for their own personal profit or convenience, or who may be upon their own conveyances at the time of the injury.

123 *d*. Because it impairs the obligations of contracts, and denies to the carrier and employé freedom of contract.

e. Because it denies to common carriers a fair and impartial trial by a jury, as known to the common law.

f. Because it is a denial to the carrier of due process of law.

g. Because it will result in the taking of their property without just compensation.

And thereupon counsel for the plaintiff offered the following prayers for instruction, the first of which was rejected by the Court and the second of which was granted, being conceded by counsel:

I.

The jury are instructed that if they find from the evidence that the injury to the plaintiff proximately resulted from the negligence of any of the employees of the defendant, or from the negligent location or construction of track number eight in its Fourteenth Street Yard or the switch controlling said track, or from the negligent failure to equip said switch with a proper target or signal, their verdict should be for the plaintiff.

Rejected.

II.

If the jury find for the plaintiff, they should award him such an amount as will compensate him for the suffering of mind and body, the personal inconvenience, and the loss of time and earnings,
124 and for all damage naturally and proximately resulting from the injury he sustained, as shown by the evidence; and if they find that his injuries are permanent, they will also award such damages as will compensate him for such suffering and inconvenience as they find he will suffer in the future, and for such loss of earning power as they find he has sustained, as a result of said injury.

Conceded.

And thereupon the defendant prayed the Court to instruct the jury as follows:

I.

If the jury shall find from the evidence that the accident in which the plaintiff received his injuries was caused by the failure and neglect of one of the train crew of which the plaintiff was a member to see that number 8 switch was closed, then they are instructed that this was the negligence of a fellow-servant of the plaintiff and that the defendant company cannot be held responsible therefor.

Rejected.

II.

If the jury shall find from the evidence that the accident complained of occurred in what is known as the 12th Street Yard of the defendant company, and that when said yard was prepared for occupancy and the tracks therein were located it was deemed impracticable and dangerous by the defendant's engineers to place a switch target near the point of Number 8 switch, and that said switch was intentionally located and constructed without such target, and the trainmen operating in said yard were required to make an
125 observation of the point of said switch to see whether it was open or closed before attempting to move cars or trains over

or past it, and that the plaintiff had been employed by the defendant company for a long time prior to the accident and had worked in said yard both in the nighttime and daytime on frequent occasions during his period of service and knew of the absence of said target and of the necessity of the trainmen making such observation before using said switch and tracks, then the jury are instructed that by remaining in the service of the defendant company engaged in the operation of trains in said yard the plaintiff assumed the risk of accidents which might result from the absence of such switch target.

Rejected.

But the Court refused to grant said prayers for instructions, or either of them, to which ruling of the Court the defendant by its counsel then and there duly excepted, and said exception was entered at the time upon the minutes of the Court.

MEM.—(The Court rejected plaintiff's prayer No. *1* and defendant's prayer No. *2* on the ground that there was no evidence that would justify the submission or argument of the case to the jury on the theory that the jury might find negligence on the part of the defendant in the construction or location of track No. *8*, or in the failure to equip the same with a target or signal.)

And thereupon the Court voluntarily and of its own motion instructed the jury as follows:

Gentlemen of the jury, the duty of the court in this case
126 is fulfilled, I hope, by a very brief statement to you. The question now is simply a question of damages, because it is practically conceded that he is entitled to recover under this law of 1908.

If this plaintiff was injured by the negligence of any of the servants of the railroad company, in this case by negligence in failing to shut or close a switch so that the cars ran into the car on which the plaintiff was and he was injured by being thrown from the car, by reason of the fact that the car went onto the wrong track, and if all of that happened by reason of the negligence of any of the employés of the defendant company, he is entitled to recover.

The defendant has very frankly conceded to you that he believes that it did so happen. That relieves the Court from any instruction on the law at all, except as I have given it to you in the general statement I made a moment ago.

So that the real question is as to the measure of damages. You jurors have been here too long not to know that the measure of damages is in your sole charge, depending upon the evidence that has been brought before you in the case as to what that damage has been. Here it is purely a matter of compensation. It is not a question of punishing anybody in this case. The question is how much is the plaintiff entitled to for the injury he has sustained. It is *now* what you or I or anybody else would take to have such an injury. That is not the theory upon which you must decide cases, because one man might be perfectly willing to have his arm taken off for
$10,000, and another man would not have it done for
127 $10,000,000. So that is not the question. The question is what is the amount that you think will be fair and proper to

give to the plaintiff for the injuries he has received. That is the only way you can look at it.

In line with that theory of the law, which goes upon the question of compensation and not of punishment, you will have to find the damages in this case. If a person does a thing maliciously and injures you, then you can punish him. You can give exemplary or punitive damages as they are called. But when it is not done wilfully or intentionally you give him what he is entitled to by way of compensation. This is the rule that you apply in this case. If the jury finds for the plaintiff they should award him such an amount as will compensate him for the suffering he has endured, for the personal inconvenience and loss of time and earnings, and all damages naturally and proximately resulting from the injury he has sustained, as shown by the evidence; and if you find that his injuries are permanent you will also award him such damages as will compensate him for such suffering and inconvenience as you find he will suffer in the future, and for such loss of earnings as you find he has sustained as a result of such injury.

This has been so fully explained to you by all the counsel in the case that it scarcely needs any other comment from the Court. You will give him, as compensation, such an amount of money as you think, from all the evidence in the case, he is entitled to.

I do not think there is anything else to be said to you. You will simply announce your verdict as to the amount of damages
128 that you find for the plaintiff.

Be it remembered that each of the separate and several exceptions taken by counsel for the defendant as hereinbefore set forth was so taken by said counsel then and there before the jury retired, and each of said exceptions was then and there separately and severally entered upon the minutes of the justice presiding at the trial, and counsel for the defendant then and there prayed the Court, and now prays the Court, to sign and seal this bill of exceptions in which is accurately set forth said exceptions and the substance of all of the evidence given at the trial, and in which is inserted in extenso all of the documentary evidence offered by the defendant and rejected by the Court, and at the request of said counsel the same is accordingly signed and sealed and made a part of the record in this cause this 13th day of July, A. D. 1910.

HARRY M. CLAUBAUGH, [SEAL.]
Chief Justice.

Settled by counsel July 8th, 1910.

LECKIE, FULTON & COX,
Attorneys for Plaintiff.
McKENNEY & FLANNERY,
Attorneys for Defendant.

129 *Directions to Clerk for Preparation of Transcript of Record.*

Filed July 13, 1910.

* * * * * * *

The Clerk in preparing the transcript of record in the above entitled cause will embody therein the following, to wit:

1. Declaration, filed March 8, 1909.
2. First plea of defendant, filed March 29, 1909; joinder of issue thereon, etc.
3. Memorandum of leave given defendant to file second plea, May 23, 1910.
4. Defendant's second plea and demurrer thereto, May 23, 1910.
5. Memorandum of order sustaining demurrer to said second plea, May 24, 1910.
6. Memorandum of trial and verdict of jury, May 25, 1910.
7. Motion for new trial, May 26, 1910.
8. Memorandum of order of Court on motion for new trial, June 3, 1910.
9. Remittitur by plaintiff, June 11, 1910.
10. Order overruling motion for new trial; judgment on verdict; notation of appeal in open court by defendant; amount of supersedeas bond, etc., June 13, 1910.
11. Notation of approval and filing of appeal bond, June 23, 1910.
12. Memorandum of submission to the Court of bill of ex-
130 ceptions.
13. Bill of exceptions.
14. Memorandum of order or orders extending time for settlement of bill of exceptions or filing transcript of record, if any.
15. This designation for transcript of record.

McKENNEY & FLANNERY,
Attorneys for Defendant.

Service of the foregoing designation is hereby acknowledged this 8th day of July, A. D. 1910.

LECKIE, FULTON & COX,
Attorneys for Plaintiff.

Memorandum.

August 3, 1910.—Time in which to file transcript of record in Court of Appeals extended to September 20th, 1910.

131 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to

130, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51468 at Law, wherein Theodore A. Schubert is Plaintiff and Philadelphia, Baltimore & Washington Railroad Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 14th day of September, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia Supreme Court. No. 2222. Philadelphia, Baltimore, and Washington Railroad Company, appellant, vs. Theodore A. Schubert. Court of Appeals, District of Columbia. Filed Sep. 15, 1910. Henry W. Hodges, Clerk.

MONDAY, *February 6th, A. D.* 1911.

No. 2222.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, Appellant,
vs.
THEODORE A. SCHUBERT.

The argument in the above entitled cause was commenced by Mr. J. S. Flannery, attorney for the appellant.

TUESDAY, *February 7th, A. D.* 1911.

No. 2222.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, Appellant,
vs.
THEODORE A. SCHUBERT.

The argument in the above entitled cause was continued by Mr. J. S. Flannery, attorney for the appellant, and by Mr. John A. Kratz, Jr., attorney for the appellee, and was concluded by Mr. J. S. Flannery, attorney for the appellant.

No. 2222.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, Appellant,
vs.
THEODORE A. SCHUBERT.

(*Opinion.*)

(Mr. Chief Justice Shepard delivered the opinion of the Court.)

This is an appeal from a judgment recovered by Theodore A. Schubert an employee of the Philadelphia, Baltimore, and Washington Railway Company, against said Company in an action for personal injuries received.

The Railway Company filed a plea alleging the following facts substantially: Plaintiff, before the receipt of his injuries applied for membership of the Relief Fund of the Company, and was admitted thereto. The funds of the association are derived from voluntary payments by members at a fixed monthly rate. The associated railways of the system to which defendant belonged took general charge of the relief department and its funds, becoming responsible for their safe keeping, supplied the facilities for conducting the administration, paid all the operating expenses, and guaranteed the

fulfillment of all obligations. During the year 1908, in which plaintiff received his injuries, there were 6909 members of the relief association, and defendant contributed that year $21,557.02 as the cost of administration. The regulations of the association provided that if a member or his legal representatives should make claim against one of the associated railway companies on account of injuries, the payments of benefits from the fund should not be made unless the claim should be withdrawn. Any compromise or judgment in such suit shall preclude any claim upon the relief fund; and the acceptance of benefits from the relief fund by a member or his beneficiaries shall operate as a release and satisfaction of all claims against the railway company for damages arising from such injury or death. That after the plaintiff received his said injuries, he had his election between the acceptance of benefits from said fund, and the bringing of an action for damages against the defendant. That plaintiff voluntarily and freely accepted certain benefits from said fund, receiving the following sums therefrom: June 12th, 1908, for 18 days $18.00; July 10th, 1908, for 30 days $30.00; and on August 7, 1908, for 31 days $31.00. That after said payments the plaintiff made a claim for damages and no more payments were made to him from said fund. That the voluntary acceptance of said benefits subsequent to the date of his said injury and prior to the institution of his action, by the terms of said regulations, operated a release of all claims of damages, and is a bar to the said action.

The Court sustained a demurrer to this plea. Plaintiff recovered a judgment for $7,500.00 from which this appeal has been prosecuted.

The single error presented for consideration is that assigned on exceptions taken to the action of the Court in sustaining the demurrer to defendant's plea, hereinbefore set out.

The action was maintained under the Employer's Liability Act approved April 22, 1908 (35 Stat. 65); and the ground for overruling the demurrer is found in Section 5 of said Act which reads as follows:

"That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

The Act of 1908, it will be remembered, was enacted to remedy the defects which had rendered the Act of 1906 to a certain extent invalid. The language of Section 5 differs in language from Section 3 of the earlier Act, which deals with the same subject.

The difference is the basis of an argument that contracts of the nature and purpose of that set forth in the plea were not intended to be stricken down by Section 5. Without following the argument,

or reviewing the provisions of the former section in connection with Section 5, we think it sufficient to say that we see no ground for the distinction urged. The contract in this case is, in our opinion, clearly within the prohibition of Section 5 of the Act of 1908.

The argument directed to the constitutionality of section 5 as interpreted above, is, we think, substantially answered in the opinion of Mr. Justice Robb, in the recent case of McNamara vs. Washington Terminal Company 35 App. D. C. 230, though the question involved was the validity of section 3 of the former act, which act, though inoperative in a state, has been held to be operative in the District of Columbia and other territory under the exclusive jurisdiction of the United States. Since the submission of this case, the questions here raised have been set at rest by a decision of the Supreme Court of the United States in C. B. & Q. Ry. Co. vs. McGuire—February 20th, 1911. In view of that decision further discussion is unimportant as well as unnecessary.

There was no error in the judgment sustaining the demurrer and the judgment will be affirmed with costs.

Affirmed.

MONDAY, *March 6th, A. D.* 1911.

No. 2222, January Term, 1911.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, Appellant,
vs.
THEODORE A. SCHUBERT.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. CHIEF JUSTICE SHEPARD.
March 6, 1911.

MONDAY, *March 13th, A. D.* 1911.

No. 2222.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, Appellant,
vs.
THEODORE A. SCHUBERT.

On motion of Mr. G. B. Craighill, on behalf of counsel for the appellant, it is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of ten thousand dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Philadelphia, Baltimore and Washington Railroad Company, Appellant, and Theodore A. Schubert, Appellee, a manifest error hath happened, to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 13th day of March, in the year of our Lord one thousand nine hundred and eleven.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———,
——— ———.

(*Bond on Writ of Error.*)

Know all Men by these Presents, That we, The Philadelphia, Baltimore and Washington Railroad Company, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto Theodore A. Schubert in the full and just sum of Ten thousand dollars ($10,000.00) to be paid to the said Theodore A. Schubert, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this Sixteenth day of March, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between The Philadelphia, Baltimore and Washington Railroad Company and Theodore A. Schubert a judgment was rendered against the said The Philadelphia,

Baltimore and Washington Railroad Company and the said The Philadelphia, Baltimore and Washington Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Theodore A. Schubert citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said The Philadelphia, Baltimore and Washington Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

PHILADELPHIA, BALTIMORE AND
WASHINGTON RAILROAD COMPANY,
By SAM'L REA, *First Vice President.* [SEAL.]

Attest:

[Seal of Philadelphia, Baltimore & Washington Railroad Company.]

ROB. H. GROFF, *Ass't Secretary.* [SEAL.]
AMERICAN SURETY COMPANY OF
NEW YORK. [SEAL.]
By L. BERT NYE, *Resident Vice-President.*

Attest:

[Seal of American Surety Company of New York.]

CLAUDE B. BROWN. [SEAL.]
Resident Assistant Secretary.

Sealed and delivered in the presence of—

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

Bond satisfactory.

LECKIE, FULTON & COX,
Att'ys for Theo. A. Schubert.

[Endorsed:] No. 2222. Philadelphia, Baltimore and Washington Railroad Co., Appellant, vs. Theodore A. Schubert. Supersedeas Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Mar. 18, 1911. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Theodore A. Schubert, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days

from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Philadelphia, Baltimore and Washington Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 18th day of March, in the year of our Lord one thousand nine hundred and eleven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted March 20th, 1911.

LECKIE, FULTON & COX,
M. J. FULTON,
Counsel for Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Mar. 20, 1911. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to — inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Philadelphia, Baltimore and Washington Railroad Company, Appellant, vs. Theodore A. Schubert, No. 2222, January Term, 1911, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 20th day of March, A. D. 1911.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,586. District of Columbia Court of Appeals. Term No. 965. Philadelphia, Baltimore and Washington Railroad Company, plaintiff in error, vs. Theodore A. Schubert. Filed March 23, 1911. File No. 22,586.

Supreme Court of the United States, October Term, 1911.

No. 549.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY,
Plaintiff in Error,
vs.
THEODORE A. SCHUBERT.

In Error to the Court of Appeals of the District of Columbia.

Assignments of Error.

The Court of Appeals of the District of Columbia erred:—

1. In holding that the provisions of the Act of Congress, approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroads to their Employés in Certain Cases," and particularly the provisions of section 5 thereof, were and are applicable to the plaintiff's cause of action as set forth in his declaration filed in the above entitled cause, and in further holding that said provisions of said Act, as and when applied to said cause of action, were and are valid in law;—

2. In not holding that the provisions of said section 5 of said Act of Congress, approved April 22, 1908, were and are inapplicable to plaintiff's cause of action as set forth in the pleadings filed in the above entitled causes, or if applicable thereto, then in not holding said provisions of said Act of Congress to be invalid in law because opposed to the provisions of Article V of the Articles of Amendments to the Constitution of the United States.

3. In affirming the action of the Supreme Court of the District of Columbia in sustaining the demurrer of the plaintiff to defendant's Second Plea, filed May 23, 1910 (printed transcript of record, pages 5-13 incl.), and in holding that the relief benefit contract between the plaintiff and the defendant therein referred to and pleaded by way of defense to plaintiff's suit was "within the prohibition of section 5 of the Act of 1908," above referred to.

(For more detailed grounds of the errors in law above generally assigned, see printed transcript of record herein at pages 99 and 100).

4. In affirming the judgment of the Supreme Court of the District of Columbia.

FREDERIC D. McKENNEY,
JOHN SPALDING FLANNERY,
WILLIAM HITZ,
Attorneys for Philadelphia, Baltimore & Washington Railroad Company, Plaintiff in Error.

Service of a copy of the above assignments of error acknowledged this 19th day of October A. D. 1911.

JOSEPH W. COX,
M. J. FULTON,
Attorneys for Theodore A. Schubert,
Defendant in Error.

[Endorsed:] In the Supreme Court of the United States, October Term, 1911. No. 549. 22,586. Philadelphia, Baltimore and Washington Railroad Company, Plaintiff in Error, vs. Theodore A. Schubert. Assignments of Error. Law Offices of Wayne MacVeagh, Frederic D. McKenney, John Spalding Flannery, William Hitz, G. Bowdoin Craighill, ninth floor Hibbs Building, 723 Fifteenth Street, Washington, D. C.

[Endorsed:] File No. 22,586. Supreme Court U. S. October Term, 1911. Term No. 549. Philadelphia, Baltimore & Washington R. R. Co., pl'ff in error, vs. Theodore A. Schubert. Assignment of errors and proof of service of copy of same. Filed October 20, 1911.

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 549.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, *Plaintiff in Error,*

v.

THEODORE A. SCHUBERT.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Motion to Affirm and Brief in Support Thereof.

Comes now the appellee and moves the Court to affirm the judgment of the Court of Appeals of the District of Columbia in the above-entitled case, and in support thereof says:

Statement.

The appellant was sued in the Supreme Court of the District of Columbia by appellee to recover dam-

ages for personal injuries, received by him through the negligence of the appellant in the operation of its railroad.

The appellant filed two pleas to the declaration; the general issue and a special plea in bar.

By the latter plea it was set up in substance that, before the injuries complained of were sustained by the plaintiff, he had become a member of the relief department of the defendant company, and by his application and contract of membership therein, had agreed to be bound by all its regulations; that he agreed that the defendant should apply $2.10 monthly from his wages as a contribution to the relief fund, for the purpose of obtaining the benefits provided for by said regulations; that in consideration of the contributions of the defendant company to the relief department and of the guarantee by the company of the payment of the benefits provided for in the regulations of said department, the acceptance of such benefits for injury should operate as a release of all claims, against the appellant for damages by reason of such injury, and that under said contract, the appellee accepted benefits amounting to $79.00 after he had sustained his injuries, and thereby released the defendant from all claims or demands which he had by reason of the injuries set out in the declaration (R., pp. 5-12).

The appellee demurred to the special plea on the ground that under the Employers' Liability Law, the facts alleged therein constitute no defense to the action. The Court sustained the demurrer (R., p. 13).

It was conceded on the trial that the injury to appellee resulted through the negligence of a fellow-employee of the plaintiff—one of the members of the plaintiff's train crew—and that the plaintiff himself was not guilty of negligence, and the judgment was for the plaintiff in the sum of $7,500.00.

In the Court of Appeals, the discussion was confined to two questions urged by appellant as reasons why it was not liable, to wit:

1. That the Employers' Liability Law, Act of April 22, 1908, under which the suit was maintained, is unconstitutional; and

2. That if the Employers' Liability Law is constitutional, it has no application to the relief benefit contract pleaded as a release in this case.

The Court of Appeals denied both of these contentions and affirmed the judgment of the trial Court (R., p. 105).

Appellant now assigns as error in this Court:

1. The failure of the Court of Appeals to hold that section 5 of said Act of April 22, 1908, is unconstitutional; and

2. That, if constitutional, it has no application to the relief benefit contract pleaded in this case (R., p. 111).

As to Affirmance.

The motion to affirm should be granted because:

1. Under the decisions of this Court, Section 5 of the Employers' Liability Act of 1908, as applicable to the District of Columbia, is constitutional; and

2. The contention that the Act does not embrace the kind of contract pleaded by appellant as a defense is clearly frivolous and made only for the purpose of delay.

I.

Section 5 of the Employers' Liability Act of 1908 as applicable to the District of Columbia is constitutional.

For convenience, we print below, in parallel columns, Section 3 of the Employers' Liability Act of 1906, Section 5 of the Employers' Liability Act of 1908, and Section 2071 of the Code of Iowa, all of which will be hereafter referred to.

Sec. 3. "That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: Provided, however, That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative."

Sec. 5. "That any contract, rule, regulation, or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, or relief benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which said action was brought."

Sec. 2071. "Nor shall any contract of insurance relief, benefit or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation or any other person or association acting for such corporation, nor shall the acceptance of any such relief, insurance, benefit or indemnity by the person injured, his widow, heirs or legal representatives after the injury, from such corporation, person or association, constitute any bar or defense to any cause of action brought under the provisions of this section; but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to the injuries received."

This Court has decided that, as applied to the District of Columbia, the Employers' Liability Act of 1906 was constitutional in its main features, and separable in its provisions.

El Paso R. Co. v. Gutierrez, 215 U. S., 87.
Employers' Liability Cases, 207 U. S., 463.

The Employers' Liability Act of 1908 was passed to remedy certain defects in the Act of 1906 which affected the constitutionality of the latter act as applied to the States, and like that of 1906, is clearly separable in its provisions as applied to the District of Columbia. We are concerned here only with the constitutionality of Section 5, as applied to the District of Columbia, which is assailed on the ground that it is in conflict with the 5th Amendment to the Constitution (Rec., p. 111).

The constitutionality of Section 3 of the Act of 1906 was sustained by the Court of Appeals of the District of Columbia in *McNamara v. Washington Terminal Co.,* 35 App. D. C., 230, and the constitutionality of the Iowa Statute was sustained by this Court in *C. B. & Q. R. Co. v. McGuire,* 219 U. S., 549.

The same reasons which governed this Court in the McGuire case, and which governed the Court of Appeals in the McNamara case, governed the Court of Appeals in the case at bar in sustaining Section 5 of the Act now under consideration. (Opinion Chief Justice Shepard, Rec., p. 105.)

A comparison of Section 3 of the Act of 1906 and

Section 5 of the Act of 1908, with the Iowa Statute shows that they were all drawn along the same lines, covering the same subject-matter, and having the same purpose, to wit, to prevent escape from the liability defined by the several statutes.

C. B. & Q. Ry. Co. v. McGuire, supra, p. 572.
McNamara v. Washington Terminal Co., supra.

In view of the decision of this Court in the McGuire case, it is believed, no serious contention can longer be made that Section 5 is unconstitutional, the question having "been set at rest" by that decision. (Opinion Chief Justice Shepard, R., p. 107.)

II.

Section 5 of the Employers' Liability Act of 1908 is applicable to the relief benefit contract pleaded in this case.

In the *McNamara case, supra,* the Court of Appeals held that the "relief benefit" contract, pleaded in that case, which was in all respects similar to the contract in the case at bar, was embraced within the terms of Section 3 of the Act of 1906.

In the case at bar, the Court of Appeals took the view that the question is finally settled by the decision of this Court in the *McGuire case.*

A comparison of the pleas made in the McGuire case and in the case at bar, the substance of which

we print below in parallel columns, clearly shows that the contracts involved in the two cases were "relief benefit" contracts similar in all respects.

SCHUBERT CASE:

By the plea in this case it was set up in substance that, before the injuries complained of were sustained by the plaintiff, he had become a member of the relief department of the defendant company, and by his application and contract of membership therein, had agreed to be bound by all its regulations; that he agreed that the defendant should apply $2.10 monthly from his wages as a contribution to the relief fund, for the purpose of obtaining the benefits provided for by said regulations; that in consideration of the contributions of the defendant company to the relief department and of the guarantee by the company of the payment of the benefits provided for in the regulations of said department, the acceptance of such benefits for injury should operate as a release of all claims, against the appellant, for damages by reason of such injury, and that under said contract, the appellee accepted benefits amounting to $79.00 after he had sustained his injuries, and thereby released the defendant from all claims or demands which he had by reason of the injuries set out in the declaration. (R., pp. 5-12.)

MCGUIRE CASE:

"The question arose upon demurrer to the defense in the answer of the railroad company, which asserted the bar denied by the statute. This defense, in substance, alleged that in November, 1900, and prior to his injury, the defendant in error had voluntarily become a member of the relief department of the railroad company and thereupon had agreed that the acceptance of the benefits payable to him in accordance with the regulations of the department, should discharge the company from all liability for damages; that after he had sustained the injuries alleged in his petition he had received benefits from the relief fund of the department amounting to $322.00, and that the payment and acceptance of these benefits constituted under the agreement full satisfaction of the claim in suit." (219 U. S., 560-1.)

It is therefore submitted that the Court of Appeals is correct in the view that the decision in the *McGuire case* concludes the question here.

But aside from the decision of this Court in the McGuire case, it is perfectly clear from a considera-

tion of the language of the section and its terms that the contract relied upon is covered by it.

The contract in question is a "relief benefit" contract entered into by the employee under which there was an acceptance of relief benefits.

The language of Section 5, which was intended to strengthen and not to destroy Section 3 of the Act of 1906 is general and more comprehensive, for it embraces not only *all contracts,* "the intent and purpose of which shall be to enable the carrier to exempt itself from liability" to its employees for negligence, but "every rule, regulation or device whatsoever," having such intent or purpose.

That both Section 3 and Section 5 were specifically intended to apply to the contract in question, even more clearly appears from the proviso which is a part of each, in substance the same in both, and which, quoting from Section 5, is as follows:

> "*Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, *or relief benefit,* or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which said action was brought."

This proviso shows, it is believed, beyond question or doubt, especially when read in the light of Section 3, of which it is also a part, that the contracts referred to in Section 5 embrace the contracts de-

scribed in Section 3. The object of the proviso, in accordance with the rule of construction so often repeated and applied by this Court (see Wayman v. Southard, 10 Wheat., 1; Minis v. U. S., 15 Pet., 423; White v. U. S., 191 U. S., 545) is to "qualify or restrain" the prior language of the section by excepting and reserving to the carrier a certain right under the contract which had been condemned, viz., the right to set off in the action the amount actually contributed or paid by it under such contract toward the benefits received by the employee. If the contracts enumerated in Section 3 were not embraced within the contracts condemned by Section 5, whence the necessity of protecting and reserving thereunder the same right of set off reserved in Section 3. If the acceptance of the relief benefit by the employee would release the carrier from liability, what could be the occasion for conferring upon the carrier the right to set off in the action the amount it had contributed or paid to such relief benefit? Clearly, the proviso is meaningless unless Section 5, like Section 3, applies to just such a contract as that in question.

Section 5 applies to "any contract * * * the purpose and intent of which shall be to enable any common carried to exempt itself from any liability created by this act."

It was urged, however, by appellant, in its brief in the Court below, that Section 5 applies only to contracts the purpose or intent of which is to *exempt* the carrier from negligence, and not merely to restrict, limit or modify the carrier's common law duties or obligations. But the language of the Statute

under the strictest interpretation does not admit of such construction. It is addressed not to contracts that provide for exemption from liability such as that considered in the Voigt Case (176 U. S., 498), but to "any contract the purpose and intent of which *shall be to enable* any common carrier to exempt itself," *i. e., "to free, except or excuse itself from the burden" of liability.* Could any clearer proof possible be shown that the contract now in question is just such a contract of just such *purpose and intent,* than its presence in this case under the contention that it is a complete bar to the plaintiff's cause of action, although the defendant probably contributed thereunder less than $10.00 of the $79.00 received by the plaintiff as benefits.

It was further contended by appellant in its brief in the Court below, that the section was not intended to apply to contracts made before the passage of the act, and that there could not have been any "purpose or intention" at the time the contract was made "to exempt the master from or to evade the obligations of an act * * * not then in existence."

It will be observed that the section does not declare that the purpose or intent must exist in the minds of the parties at the time the contract was made; the section condemns the contract, if its "purpose and intent *shall be*" (at the time its provisions are invoked) "to enable the carrier to exempt" (free, except or excuse) itself from the liability imposed. This construction not only accords with the spirit and object of the statute, but with the most

exact literal meaning of the terms used. The Standard Dictionary gives, among other definitions of the words, the following:

> "Purpose" is defined as "practical advantage; consequence; use."
> "Intent" is defined as "The character that the law imputes to an act irrespective of the personal intention of the actor."

The section, by its express terms, deals with the *purpose and intent of the contract,* not of the parties thereto; it deals, not with the purpose and intent that may have existed prior to the passage of the law, but the purpose and intent which *shall be,* after the passage of the law.

It is a well-known rule of construction that where words are susceptible of several meanings the courts will always adopt that meaning which best consists with all other provisions of the statute, and its spirit and purpose as a whole.

36 Cyc., 1128, 1129.
Wayman v. Southard, 10 Wheat., 1.
Bernier v. Bernier, 147 U. S., 242.

But even if it were conceded that the *purpose or intent* of the contract, mentioned in the section, means a purpose or intent existing at the time of the making of the contract, the section would still be applicable to the contract in question.

At the time of the making of the contract, there was beyond question a *purpose and intent* on the

part of the carrier to use the contract, in the event the employee was injured through negligence, to excuse itself from liability therefor. And at the time of the passage of the act, Congress knew that the purpose and intent of such contracts had been to enable the carriers to excuse themselves from *liability for negligence.* Congress also knew that, if allowed to stand, such contracts would continue to be used with the purpose and intent of excusing the carrier from the *liability for negligence created,* or more accurately speaking, *defined,* by Sections 1 and 2 of the act. For if the contract resulted in enabling the carrier to excuse itself from *liability for negligence,* as defined prior to the passage of the act, there was nothing to prevent the contract, if allowed to stand, from enabling the carrier to relieve itself from such *liability as defined* by the act. The purpose or intent of the contract in question at the time it was made being to enable the carrier by means thereof to exempt or excuse itself from *liability for negligence,* the contract comes within the true meaning of Section 5, even if we concede that the intent and purpose must exist at the time of making the contract instead of at the time when its provisions are invoked.

To accept the contention that Section 5 applies to such contracts as the relief benefit contract in this case, if entered into after the passage of the act, but does not apply to such a contract when entered into prior to the passage of the act, leads to absurd consequences.

It was recognized in the McNamara case that contracts similar to that in question are in common use by railroad companies. If such contracts made prior to the passage of the law are valid and only those made since the passage void, then most of the railroad employees of the country can have no benefit from the provisions, except upon condition that in the event they are injured they forfeit the relief benefits for which they have paid. We shall have different rules applying to the rights of employees to recover in cases of those employed before, and those employed after, the passage of the act. We shall have different rules of liability governing companies organized before the passage of the act, and having such contracts in force with their employees, and those organized after its passage. We shall have an act, on its face intended for the benefit of all employees of railroad companies; but, in effect, comparatively few in number will be free to accept its benefits. With the act apparently intending to enforce, for the benefit of the public, strict liability of carriers for negligence, we shall for a long time after its passage be unable to secure, except to a small degree, the protection thereby intended.

Courts will always, when it is possible to do so, construe a statute so as to avoid insensible meaning, or absurd results, which are never to be imputed to Congress. The object designed to be reached by the act will often control the literal import of its terms and the phraseology employed; and "there is always a presumption against a construction which will

render a statute ineffective or inefficient, or which would cause public injury or inconvenience."

See—

Durousseau v. U. S., 6 Cranch., 307, 314.
Church of Holy Trinity v. U. S., 143 U. S., 457, 460.
McKee v. U. S., 164 U. S., 287, 293.
Hawaii vs. Mankichi, 190 U. S., 197, 213.
Bird v. U. S., 187 U. S., 118, 124.

The consequences arising upon the construction of the section suggested by appellant would justify the Court in restraining the literal import of its words, if necessary to avoid such an interpretation. But as we have already seen, that it is only by a strained interpretation of the language of the section, and by leaving entirely out of view its purpose, and its relation to the statute as a whole and to the earlier act, that such a construction could possibly be arrived at.

Viewed from any or every standpoint, Section 5 applies to the contract in question, with like effect as Section 3 of the former act would have applied had the action arisen thereunder; and it is respectfully submitted that the judgment of the Court below should be affirmed.

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SUBJECT INDEX.

	Page.
STATEMENT OF CASE	1-3
Declaration	2
Plea in bar of defendant	2
Demurrer of plaintiff	2
Judgment for plaintiff	3
Decision of Court of Appeals	3
Assignments of error	3
LAWS REFERRED TO	5
Section 3, Employers' Liability Act of 1906	5
Section 5, Employers' Liability Act of 1908	5
Section 2071, Code of Iowa	5
ARGUMENT OF DEFENDANT IN ERROR	4-17
Applicability of Section 5 to relief benefit contract pleaded as a defence	4
as shown by decisions in analogous cases	4-8
as shown by purpose and object of the law	8-15
as shown by the language of Section 5	16-17
ANSWER TO CONTENTIONS OF PLAINTIFF IN ERROR	17-24
(1) Purpose of contract to exempt from liability	18
(2) Section 5 applies to contracts made prior to the passage of the act	18-23
(3) Contention of [redacted] Plaintiff in error leads to absurd consequences	23-24
CONCLUSION	25

CASES AND AUTHORITIES CITED.

Page.

Armour Packing Co. v. U. S., 209 U. S., 56.....22-23
Bernier v. Bernier, 147 U. S., 242, 246..... 20
Bird v. U. S., 187 U. S., 118, 124..... 24
Brown v. B. & O. R. Co., 6 App. D. C., 237..... 11
Bullard v. Northern P. R. Co., 11 L. R. A., 246..... 23
C. B. & Q. R. Co. v. McGuire, 219 U. S., 549..... 7-9
Church of Holy Trinity v. U. S., 143 U. S., 457, 460.. 24
Cyc., Vol. 9, 543..... 10
Cyc., Vol. 36, 1128, 1129..... 20
Durousseau v. U. S., 6 Cranch., 307, 314..... 24
Employers' Liability Cases, 207 U. S., 533..... 9
Farwell v. Boston & W. R. Corp., 4 Met., 49..... 20
Fitzgerald v. Grand Trunk R. Co., 13 L. R. A., 70..... 23
Hawaii v. Mankichi, 190 U. S., 197, 213..... 24
Johnson v. R. Co., 163 Pa. St., 127..... 11
Law Notes for December, 1910..... 20
Lawson on Contracts, 9 Cyc., 544..... 10
Legal Tender Cases, 12 Wall., 457..... 22
Louisville & Nashville R. Co. v. Mottley, 219 U. S., 467. 23
McKee v. U. S., 164 U. S., 287, 293..... 24
McNamara v. Washington Terminal Co., 35 App. D. C., 230 7-10-11-22
Minis v. U. S., 15 Pet., 423..... 17
Mitchell v. Clark, 110 U. S., 633..... 22
Mondou v. R. Co. (decided January 15, 1912).....3-8-22
Murray v. S. C. R. Co., 1 McMul. (S. C.), 385..... 20
Narramore v. Cleveland, etc., R. Co., 96 Fed., 298, 300.. 9
Sherman & Redfield on Negligence, 5th Ed..... 20
United States v. Delaware & Hudson Co., 213 U. S., 366 22
Voigt Case, 176 U. S., 498..... 18
Watson v. R. Co., 169 Fed., 942-51.....8-9-20-22
Wayman v. Southard, 10 Wheat., 1.....17-20
White v. U. S., 191 U. S., 545..... 17

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 549.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, *Plaintiff in Error,*

v.

THEODORE A. SCHUBERT.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Brief of Defendant in Error.

STATEMENT.

The Plaintiff in Error (hereinafter called the defendant) was sued in the Supreme Court of the District of Columbia by the defendant in error (hereinafter called the plaintiff) to recover damages for personal injuries, received by him through the negligence of the defendant in the operation of its railroad.

The defendant filed two pleas to the declaration; the general issue and a special plea in bar.

By the latter plea it was set up in substance that, before the injuries complained of were sustained by the plaintiff, he had become a member of the relief department of the defendant, and by his application and contract of membership therein, had agreed to be bound by all its regulations; that he agreed that the defendant should apply $2.10 monthly from his wages as a contribution to the relief fund, for the purpose of obtaining the benefits provided for by said regulations; that in consideration of the contributions of the defendant to the relief department and of the guarantee by the company of the payment of the benefits provided for in the regulations of said department, the acceptance of such benefits for injury should operate as a release of all claims, against the defendant for damages by reason of such injury, and that under said contract, the plaintiff accepted benefits amounting to $79.00 after he had sustained his injuries, and thereby released the defendant from all claims or demands which he had by reason of the injuries set out in the declaration (R., pp. 5-12).

The plaintiff demurred to the special plea on the ground that under the Employers' Liability Law, the facts alleged therein constituted no defense to the action. The Court sustained the demurrer (R., p. 13).

It was conceded on the trial that the injury to plaintiff resulted through the negligence of a fellow-employee—one of the members of the plaintiff's

train crew—and that the plaintiff himself was not guilty of negligence, and the judgment was for the plaintiff in the sum of $7,500.00.

In the Court of Appeals, to which the case was taken, the discussion was confined to two questions urged by defendant as reasons why it was not liable, to wit:

1. That the Employers' Liability Law, Act of April 22, 1908, under which the suit was maintained, is unconstitutional; and

2. That if the Employers' Liability Law is constitutional, it has no application to the relief benefit contract pleaded as a release in this case.

The Court of Appeals denied both of these contentions and affirmed the judgment of the trial Court (R., p. 105).

Defendant assigns as error in this Court:

1. The failure of the Court of Appeals to hold that Section 5 of said Act of April 22, 1908, is unconstitutional; and

2. That, if constitutional, it has no application to the relief benefit contract pleaded in this case (R., p. 111).

This case was docketed before the decision of this Court in *Mondou v. Railroad Company,* decided January 15, 1912. In view of that decision, it is not believed the contention can longer be made, that the law in question (and particularly Section 5 thereof) is unconstitutional. The only question, therefore, raised by defendant and left for discussion, is the applicability of said Section 5 to the relief benefit contract pleaded as a defense in this case.

ARGUMENT.

Section 5 of the Employers' Liability Act of 1908 is applicable to the relief benefit contract pleaded in this case.

For convenience in the discussion which follows, we print below in parallel columns, the sections *in pari materia* of the Employers' Liability Act of 1906, the Employers' Liability Act of 1908, and of the Code of Iowa, together with the substance of contracts respectively involved in cases arising under said acts:

Sec. 3. "That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: Provided, however, That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative."

Sec. 5. "That any contract, rule, regulation, or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, or relief benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which said action was brought."

Sec. 2071. "Nor shall any contract of insurance relief, benefit or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation or any other person or association acting for such corporation, nor shall the acceptance of any such relief, insurance, benefit or indemnity by the person injured, his widow, heirs or legal representatives after the injury, from such corporation, person or association, constitute any bar or defense to any cause of action brought under the provisions of this section; but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to the injuries received."

McNamara Case:

"In the plea in bar it was alleged that the plaintiff, on the 31st day of August, 1907, applied for and on the 4th day of September following was admitted to, membership in the relief department of the Baltimore & Ohio Railroad Company, and that he was a member of said department when he sustained the injuries set forth in his declaration. The plea then sets out in detail said application,

Schubert Case:

By the plea in this case it was set up in substance that, before the injuries complained of were sustained by the plaintiff, he had become a member of the relief department of the defendant company, and by his application and contract of membership therein, had agreed to be bound by all its regulations; that he agreed that the defendant should apply $2.10 monthly from his wages as a

McGuire Case:

"The question arose upon demurrer to the defense in the answer of the railroad company, which asserted the bar denied by the statute. This defense, in substance, alleged that in November, 1900, and prior to his injury, the defendant in error had voluntarily become a member of the relief department of the railroad company and thereupon had agreed that the acceptance of the benefits pay-

McNamara Case
(Continued)

from which it appears that the plaintiff, as a condition to his employment by the defendant railroad company, agreed 'to be bound by all the regulations of said department hereafter adopted applicable to the relief feature.' It was also agreed 'that the said company, by its proper agents and in the manner provided in said regulations, shall apply monthly, in advance, from the first wages earned by me under said employment, in each calendar month, sums at the rate of $2 per month as a contribution to the relief feature of said department.' * * * The application continues: 'I further agree that in consideration of the contributions of said company to the relief department, and of the guarantee by it of the payment of the benefits aforesaid, the acceptance of benefits from the said relief department for injury or death, shall operate as a release of all claims against said company.' * * *

"The plea further avers that 'the plaintiff voluntarily accepted, under said rules and regulations of the relief department, the benefits due him,' etc. (35 App. D. C., 230.)

Schubert Case
(Continued)

contribution to the relief fund, for the purpose of obtaining the benefits provided for by said regulations; that in consideration of the contributions of the defendant company to the relief department and of the guarantee by the company of the payment of the benefits provided for in the regulations of said department, the acceptance of such benefits for injury should operate as a release of all claims, against the appellant, for damages by reason of such injury, and that under said contract, the appellee accepted benefits amounting to $79.00 after he had sustained his injuries, and thereby released the defendant from all claims or demands which he had by reason of the injuries set out in the declaration. (R., pp. 5-12.)

McGuire Case
(Continued)

able to him in accordance with the regulations of the department, should discharge the company from all liability for damages; that after he had sustained the injuries alleged in his petition he had received benefits from the relief fund of the department amounting to $822.00, and that the payment and acceptance of these benefits constituted under the agreement full satisfaction of the claim in suit." (219 U. S., 560-1.)

A consideration of the terms of the foregoing contracts shows, we think, that they all had the effect of accomplishing the same purpose, all being contracts in which the employee agreed that in the event of the acceptance by him of the relief benefits covered by the contract, the company would be relieved of all liability growing out of his injury.

That the Employers' Liability Act of 1906 (Section 3) applied to a contract of this kind was decided in the case of *McNamara v. Washington Terminal Company* (35 App. D. C., 230), and this Court held that Section 2071 of the Code of Iowa embraced the contract in question in the case of *C. B. & Q. R. Co. v. McGuire,* 219 U. S., 549.

If the present action had arisen under the act of June 11, 1906, there can be no doubt that under the decision in the *McNamara* case, Section 3 of that act would be applicable to the relief benefit contract under consideration. The said contract is unquestionably "a relief benefit" contract, if not "a contract of employment," "entered into by an employee," under which there was "an acceptance of relief benefits" "by the person entitled thereto."

In the *McNamara* case, it is said of the contract then under consideration:

> "It is apparent that this was a contract of employment in which the employee agreed that in the event of the acceptance by him of the relief benefits to which the contract referred, the company would be relieved of all liability growing out of his injury. It thus appears that, while not bound under his contract to accept such relief benefits in lieu of damages for his

injury, if he did accept them he waived his right of action. It is such a situation, we think, that this section was designed to cover."

Now Section 5, like Section 3 of the earlier act, was designed to prevent evasions of the rule of liability of carriers to their employees which was declared by both acts.

Mondou v. R. Co., supra.

Watson v. Ry. Co., 169 Fed., 942-951.

It is believed that no valid reason exists for holding that Section 5 of the present act is not likewise applicable to such a contract as is pleaded in this case.

(a) A consideration of the purpose and objects of the present act and of Section 5 thereof shows that the section is applicable to the contract in question.

There can be no doubt as to what was the twofold purpose of Congress in enacting the Employers' Liability Law. It was passed to promote the safety of commerce by protecting those engaged in carrying it on. As one means, among others, of accomplishing that end, the right was conferred on the employees to bring civil actions for negligence. In other words, Congress declares the policy of responsibility for negligence as a means of effecting this purpose of the act.

Mondou v. R. Co., supra.

Watson vs. St. L., I. M. & So. Ry. Co., 169 Fed., 942.

Employers' Liability Cases, 207 U. S., 533.
Narramore vs. Cleveland C. C. & St. L. Ry. Co., 96 Fed., 298, 300.
C. B. & Q. R. Co. v. McGuire, 219 U. S., 549.

The act was also passed for the benefit of the men employed in the hazardous business of railroading, thousands of whom are annually killed or maimed through defects in appliances, or through negligence on the part of others over whom they have no control, and in whose selection they have no voice.

> "The legislative department of the nation * * * considered it an injustice, that persons injured or in case of death, the surviving members of the family, should become burdens on the public and objects of charity, and therefore considered it better policy that the employer should be required to make some provision for them charging the moneys thus expended to expenses of management, or cost of production, and collect it indirectly from the public."
>
> *Watson v. St. L., I. M. & So. Ry. Co.,* 169 Fed., 949, 950.

Congress also recognized that in the matter of making contracts, the railroad companies and their employees were not on equal footing; that contracts apparently voluntary were not so in reality; and that the railroad companies were in position largely to defeat both objects of the law by means of contracts made with their employees at the time of employment, under which the employees would ac-

cept stated sums agreed upon in advance, in the event of injuries through negligence.

McNamara v. Washington Terminal Co., supra.

Even before the passage of the law carriers could not by contract *exempt* themselves from liability for injury to their employees caused by negligence, such contracts being void as contrary to public policy.

See Article on Contracts, by *Prof. Lawson,* 9 Cyc., 544.

But there was a class of contracts in general use by railroad companies at the time of the passage of the law, recognized as valid by many, but not all, courts, which, while not expressly exempting the companies from liability for negligence, had the practical effect of enabling the companies by contract made in advance of injury to relieve themselves of the consequences of negligence, and to cause the employee to accept after injury the sum agreed upon in advance, although at the time of accepting it, he might not consider it a fair or just settlement.

The contracts through which this result was accomplished are usually referred to as *relief benefit contracts,* which generally, and perhaps always, as in the present case, became "part of the conditions of employment" (Record, p. 6). These contracts were not held to bar the employee's right of action but the acceptance under them of benefits to which the companies had contributed was held to constitute such bar.

See *9 Cyc., 543,* where the authorities so holding are collated.

As pointed out in *Johnson v. Phil. & Reading R. Co.*, 163 Pa. St., 127, cited in defendant's brief, in dealing with a contract similar to that under consideration—

> "The substantial feature of the contract which distinguishes it from those held void as against public policy is that the party retains whatever right of action he may have until after knowledge of all the facts and an opportunity to make his choice between the sure benefits of the association or the chances of litigation. Having accepted the former, he cannot justly ask the latter in addition."

And in the case of *Brown v. B. & O. R. R. Co.*, 6 App. D. C., 237, the Court of Appeals also took note of the distinction between those cases in which there was only a pre-contract to accept benefits and release the companies, and those in which there was an actual acceptance of the benefits and a release in consideration thereof subsequent to the injury. It was considered by the courts, in the class of cases of which the two last cited are illustrations, that the employee was free after the accident occurred to accept the benefits or prosecute his action for negligence, and that it would be unjust and inequitable to allow him to do both.

Such freedom, it is obvious, was theoretical rather than practical. As declared in the *McNamara* case:

> "Congress has said * * * that in such a situation the carrier and employee do not stand upon an equal footing, and that the acceptance

> by the employee, under such conditions of the amount really due him from the relief fund is not absolutely free from restraint and the undue influence of the employer."

Let us take, for instance, the railroad relief contract in this case, which may reasonably be assumed to be as favorable to the employee as any of the contracts of the class under consideration. The plaintiff entered into it at the time of employment, and it became "part of the conditions of his employment." It is said to have been entered into *voluntarily,* but Congress has declared that the parties thereto *were not on equal footing.* As the cost of administering the relief fund, the company contributed $21,557.00 for the year 1908. Its 6,909 employees, who were members of the fund. if the contribution of $2.10 a month by the plaintiff, who was a brakeman, can be taken as an average, contributed about $175,000 during the same year. The plaintiff had paid his proportionate part toward this large sum of money with the expectation of securing benefits therefrom in case of sickness or accident. What is his situation after injury through the negligence of the defendant? According to the contention of the appellant, he was free, if he chose, to accept the benefits or bring his action for negligence. But his freedom to sue was conditioned upon his sustaining the forfeiture of the benefits which he had paid for, and which he was justly entitled to receive. He is compelled to refuse the money to which he is justly entitled, or accept it and waive the right the statute gives him. In other words, if he chooses to

exercise his supposed freedom of suing the company, he is subjected to the penalty of sacrificing the benefits which he had paid for, it may be, by the hard earned savings of years. It cannot be doubted that in most instances, rather than be subjected to further certain loss of what he had already paid for, he would forego the uncertainties, difficulties and delays of litigation.

To "cut up root and branch this whole attempt" of the railroad companies to make an adjustment by prior contract for injuries resulting from negligence, and to substitute for it an adjustment made after the injury and independent of the prior contract; and at the same time to prevent injustice to the employee, Congress declared by the first act that no such contract or the acceptance of benefits thereunder "should constitute any bar or defense to any action," for negligence; and by Section 5 of the present act, it declared that such contracts are void *to the extent to which their purpose or intent shall be to enable any common carrier to exempt itself from liability for negligence.*

Such contracts made prior to injury, whether contracts of employment, relief benefit contracts, insurance contracts, or indemnity contracts, were the means which the railroad companies were using at the time of the passage of the act to relieve or exempt themselves from the consequences of negligence; and unless entirely different objects and purposes are to be ascribed to Section 3 of the earlier Act, and Section 5 of the present Act, it would seem that both must apply to the contract pleaded in this case.

The present Act was passed for the purpose of remedying a constitutional defect in the antecedent act, and to that extent is remedial. Its object and purpose was to perfect and strengthen the earlier Act, and not to impair or destroy it. The general words employed in Section 5, *"any contract, rule, regulation or device whatsoever,"* instead of the descriptive words employed in Section 3 of the prior Act, clearly indicate such intention. And it would seem unreasonable to suppose that Congress having once effectively legislated so as to prevent evasions of the law, should, when it came to remedy a constitutional defect, lift the very responsibility for negligence which the act imposed, from the largest class upon which it was designed to operate.

It will be noted that it was not the purpose of either of the sections under consideration to *destroy relief benefit contracts.* All employers of large numbers of men are compelled, if for no other than selfish considerations, to have some interest in the sick and injured in their service, and to be at some cost of time and money in respect to their care. Various schemes have from time to time been adopted to secure from the employees the cost of such care and attention. In cases of ordinary sickness and injuries not occasioned by negligence, the cost of this care and attention may be properly payable by the employees; and the employer may properly persuade or even require the employees, through the means of a relief benefit or insurance association, to co-operate with each other and with the employer in

providing for the sick and injured among them. Such associations or departments doubtless are of benefit to the employer, the employed, and the community at large which is interested in both and of which both are a part. Congress did not intend to, and did not, by the sections under consideration, forbid or affect such associations or the agreements whereby they are created. What was intended by Congress and what has been done by Section 5, is to prevent railroad companies, by means of such associations, from evading the responsibility imposed by law for the consequences of negligence. The rule requiring railroad companies, regardless of prior contracts, to respond in damages to their employees for negligent acts, is declared to be a sound policy, intended to promote the safety of commerce, and to protect a class of employees not on equal footing with their employers. The statute would not discourage employees from paying for benefits in such associations; but rather declares that such employees, having paid for benefits, shall not be required to renounce such benefits as a condition precedent to their recovery for negligence. The railroad company is not condemned for or prohibited from entering the insurance business with its employees, or "administering the relief fund" provided by them; but it is prohibited from using such an arrangement as a cloak to conceal an evasion of liability for negligence, or from punishing the employee who asserts his legal remedy by a forfeiture of the benefits for which he has paid and to which he is entitled.

(b) Not only the purpose, but the language of Section 5 shows that it was intended to apply to such a contract as that in question.

The language of the first part of the superseded section is narrower and more specific in describing the contracts which shall not be a bar to the action for negligence. The language of Section 5, which was intended to strengthen and not to destroy Section 3, is general and more comprehensive, for it embraces not only *all contracts* "the intent and purpose of which shall be to enable the carrier to exempt itself from liability" to its employees for negligence, but "every rule, regulation or device whatsoever" having such intent or purpose.

That both Section 3 and Section 5 were specifically intended to apply to the contract in question, even more clearly appears from the proviso which is a part of each, in substance the same in both, and which, quoting from Section 5, is as follows:

> "*Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, *or relief benefit*, or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which said action was brought."

This proviso shows, it is believed, beyond question or doubt, especially when read in the light of Section 3, of which it is also a part, that the contracts referred to in Section 5 embrace the contracts de-

scribed in Section 3. The object of the proviso, in accordance with the rule of construction so often repeated and applied by the Supreme Court (See *Wayman v. Southard,* 10 Wheat., 1; *Minis v. U. S.,* 15 Pet., 423; *White v. U. S.,* 191 U. S., 545) is to "qualify or restrain" the prior language of the section by excepting and reserving to the carrier a certain right under the contract which had been condemned, viz., the right to set off in the action the amount actually contributed or paid by it under such contract toward the benefits received by the employee. If the contracts enumerated in Section 3 were not embraced within the contracts condemned by Section 5, whence the necessity of protecting and reserving thereunder the same right of set off reserved in Section 3? If the acceptance of the relief benefit by the employee would release the carrier from liability, what could be the occasion for conferring upon the carrier the right to set off in the action the amount it had contributed or paid to such relief benefit? Clearly, the proviso is meaningless unless Section 5, like Section 3, applies to just such a contract as that in question.

(c) The contention of the defendant that the contract in question is not embraced within the terms of Section 5 cannot be sustained.

Section 5 applies to "any contract * * * the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act."

The "*liability created by the act*" is, of course, the liability of the carrier to the employee for injuries described in Sections 1 and 2; viz., liability "for injury * * * resulting * * * *from the negligence of any of the officers, agents or employees* of such carrier, or by reason of any *defect or insufficiency due to its negligence, in its* cars, engines, appliances * * * or other equipment."

(i) It is urged by defendant that Section 5 applies only to contracts the purpose or intent of which is to *exempt* the carrier from negligence, and not merely to restrict, limit or modify the carrier's common law duties or obligations. But the language of the Statute under the strictest interpretation does not admit of the construction. It is addressed not to contracts that provide for exemption from liability such as that considered in the *Voigt Case* (176 U. S., 498), but to "any contract the purpose and intent of which *shall be to enable* any common carrier to exempt itself," i. e., *"to free, except or excuse itself from the burden" of liability.* Could any clearer proof possibly be shown that the contract now in question is just such a contract, of just such *purpose and intent,* than its presence in this case under the contention that it is a complete bar to the plaintiff's cause of action, although the defendant probably contributed thereunder less than $10.00 of the amount received by the plaintiff as benefits.

(ii) It is further contended by defendant that the section was not intended to apply to contracts made before the passage of the act, and that there could

not have been any "purpose or intention" at the time the contract was made "to exempt the master from or to evade the obligations created by an act which had not then come in existence."

It will be observed that the section does not declare that the purpose or intent must exist in the minds of the parties at the time the contract was made; the section condemns the contract, if its "purpose and intent *shall be*" (at the time its provisions are invoked) "to enable the carrier to exempt" (free, except or excuse) itself from the liability imposed.

This construction not only accords with the spirit and object of the statute, but with the most exact literal meaning of the terms used. The Standard Dictionary gives, among other definitions of the words, the following:

> "Purpose" is defined as "practical advantage; consequence; use."
>
> "Intent" is defined as "The character that the law imputes to an act irrespective of the personal intention of the actor."

The section, by its express terms, deals with the *purpose and intent of the contract,* not of the parties thereto; it deals, not with the purpose and intent that may have existed prior to the passage of the law, but the purpose and intent which *shall be,* after the passage of the law. The literal meaning of the section therefore might with equal propriety have been thus expressed:

> "That any contract * * * the practical *advantage* (*consequence or use*) and *character* of which shall be to enable any common carrier to *free or excuse* itself from the liability created by this act, shall to that extent be void."

It is a well-known rule of construction that where words are susceptible of several meanings the courts will always adopt that meaning which best consists with all other provisions of the statute and its spirit and purpose as a whole.

36 Cyc., 1128, 1129.
Wayman v. Southard, 10 Wheat., 1.
Bernier v. Bernier, 147 U. S., 242, 246.

But even if it were conceded that the *purpose or intent* of the contract, mentioned in the section, means a purpose or intent existing at the time of the making of the contract, the section would still be applicable to the contract in question. Sections 1 and 2 of the act are wholly declaratory of the common law of negligence as it existed at the time of the passage of the act, with the exception that it abolished the fellow-servant rule, which rule itself was a discredited exception to the ancient common law rule of negligence, having been invented and first applied in the cases of *Murray v. South Carolina R. Co.,* 1 McMul. (S. C.), 385; and *Farwell v. Boston & W. R. Corp.,* 4 Met., 49.

See introduction to *5th Edition, Sherman & Redfield on Negligence;* Editorial in *Law Notes* for Dec., 1910, and *Watson v. Ry. Co.,* 169 Fed., 949.

The words *"the liability created by this act,"* as used in Section 5, are believed to be equivalent to *"the liability of common carriers to their employees for negligence as defined in Sections 1 and 2 of this act."* Save for the exception indicated, the liability of the carrier to its employee was identically the same immediately before as it was after the passage of the act. At the time of the making of the contract, there was beyond question a *purpose and intent* on the part of the carrier to use the contract, in the event the employee was injured through negligence, to excuse itself from liability therefor. And at the time of the passage of the act, Congress knew that the purpose and intent of such contracts had been to enable the carriers to excuse themselves from *liability for negligence.* Congress also knew that, if allowed to stand, such contracts would continue to be used with the purpose and intent of excusing the carrier from the *liability for negligence created,* or more accurately speaking, *defined,* by Sections 1 and 2 of the act. For if the contract resulted in enabling the carrier to excuse itself from *liability for negligence,* as defined prior to the passage of the act, there was nothing to prevent the contract, if allowed to stand, from enabling the carrier to relieve itself from such *liability as defined* by the act. The purpose or intent of the contract in question at the time it was made being to enable the carrier by means thereof to exempt or excuse itself from *liability for negligence,* the contract comes within the true meaning of Section 5, even if we concede that the intent and pur-

pose must exist at the time of making the contract instead of at the time when its provisions are invoked.

The suggestion that the section might be constitutional only as to contracts made since the passage of the act, and unconstitutional if applied to contracts made prior thereto, is also fully answered by the opinion of this court in the *Mondou* case, *supra,* and in that of the Court of Appeals in the *McNamara* case, *supra.* The following cases are also in point:

Legal Tender Cases, 12 Wall., 457.
Mitchell v. Clark, 110 U. S., 633.
Armour Packing Co. v. U. S., 209 U. S., 56.
United States v. Delaware & Hudson Company, 213 U. S., 366.
See also *Watson v. St. L., etc., Ry., supra,* and cases therein cited.

The ground upon which these cases rest is that there is no prohibition in the Constitution upon Congress against the impairment of the obligations of contracts and that when *the Nation constitutionally enacts into law a rule of public policy, no obligation of contracts can extend to defeat it.*

To illustrate, the courts have unanimously held that contracts for interstate transportation at special rates, though antedating the enactment of the Federal Interstate Commerce Act, became invalid upon the enactment of the statute.

See:

Bullard v. Northern P. R. Co., 11 L. R. A., 246.

Fitzgerald v. Grand Trunk R. Co., 13 L. R. A., 70.

Note to *Armour Packing Co. v. U. S., supra*, 52 L. Ed., 681.

Louisville & Nashville R. Co. v. Mottley, 219 U. S., 467.

(iii) To accept the contention that Section 5 applies to such contracts as the relief benefit contract in this case, if entered into after the passage of the act, but does not apply to such a contract when entered into prior to the passage of the act, leads to absurd consequences.

It was recognized in the *McNamara* case that contracts similar to that in question are in common use by railroad companies. If such contracts made prior to the passage of the law are valid and only those made since the passage void, then most of the railroad employees of the country can have no benefit from the provisions, except upon condition that in the event they are injured they forfeit the relief benefits for which they have paid. We shall have different rules applying to the rights of employees to recover in cases of those employed before, and those employed after, the passage of the act. We shall have different rules of liability governing companies organized before the passage of the act, and having such contracts in force with their employees, and those organized after its passage. We shall have an act, on its face intended for the benefit of all em-

ployees of railroad companies; but, in effect, comparatively few in number will be free to accept its benefits. With the act apparently intending to enforce, for the benefit of the public, strict liability of carriers for negligence, we shall for a long time after its passage be unable to secure, except to a small degree, the protection thereby intended.

Courts will always, when it is possible to do so, construe a statute so as to avoid insensible meaning, or absurd results, which are never to be imputed to Congress. The object designed to be reached by the act will often control the literal import of its terms and the phraseology employed; and "there is always a presumption against a construction which will render a statute ineffective or inefficient, or which would cause public injury or inconvenience."

See—

Durousseau v. U. S., 6 Cranch., 307, 314.
Church of Holy Trinity v. U. S., 143 U. S., 457, 460.
McKee v. U. S., 164 U. S., 287, 293.
Hawaii v. Mankichi, 190 U. S., 197, 213.
Bird v. U. S., 187 U. S., 118, 124.

The consequences arising upon the construction of the section suggested by appellant would justify the court in restraining the literal import of its words, if necessary to avoid such an interpretation. But as we have already seen, it is only by a strained interpretation of the language of the section, and by leaving entirely out of view its purpose, and its relation to the statute as a whole and to the earlier act, that such a construction could possibly be arrived at.

(d) Viewed from any or every standpoint, Section 5 applies to the contract in question, with like effect as Section 3 of the former act would have applied had the action arisen thereunder.

The purpose of the act as contained in the sections we have considered was to declare and to make certain and definite the rule of liability of carriers to their employees for injuries resulting from negligence, and the rule that such liability can be adjusted only after injury has occurred and independent of prior contracts relating thereto.

If such be the true purpose of the section, then unquestionably the application of the section to the relief benefit contract pleaded in this case is in accordance with its spirit and purpose. It is also within its terms when literally construed, is favorable to securing the exercise of the high care that the public is entitled to exact of the carrier, secures to the employee the benefits for which he has paid and to which he is entitled, and equitably cares for the interest of the carrier so far as it may have paid to the employee any sum or sums on account of injuries in advance of adjustment of damages therefor.

It is respectfully submitted that the decision by the court below correctly held Section 5 of the Act of April 22, 1908, to be applicable to the relief benefit contract pleaded in this case; and that its judgment should be affirmed.

Counsel for Defendant in Error.

13

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 549.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THEODORE A. SCHUBERT.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
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Attorneys for Plaintiff in Error.

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Statement.

This case comes here by writ of error to review the judgment of the Court of Appeals of the District of Columbia affirming the judgment of the

Supreme Court of said District in an action to recover damages brought under the Employers' Liability Act, approved April 22, 1908 (35 Stats. L., 65), for personal injuries sustained by the plaintiff below on May 13, 1908, while engaged in the performance of his duties as a member of a shifting crew of the defendant railroad company in its yards in the vicinity of 12th street southwest, in the city of Washington, D. C.

In addition to the plea of the general issue, the defendant below pleaded specially (R., 5-12) in bar of the plaintiff's right to recover a contract which the plaintiff had made voluntarily and without solicitation with the defendant's relief department on October 26, 1905, when he entered the defendant's service, and certain payments which had been made to him in accordance with the provisions of said contract, and had been voluntarily accepted by him subsequently to and on account of his said injury.

The plaintiff below demurred to the special plea on the ground that the facts therein alleged and admitted by said demurrer constituted no defense to the plaintiff's cause of action under said Employers' Liability Act of 1908. This demurrer was sustained and evidence offered at the trial in support of the allegations of said special plea was rejected by the trial justice as constituting no legal ground of defense to the action (R., 99).

Upon the trial it appeared that plaintiff's injuries had been occasioned solely by the negligence of a fellow servant—a fellow member of the same train crew—and this under the statute being assumed not to constitute any substantial defense to the action, the case was submitted to the jury and finally resulted in a judgment of $7,500.00 in favor of plaintiff and against the railroad company.

ARGUMENT.

The defendant in error has moved for an affirmance of this judgment for the following reasons:

> "1. Under the decisions of this court, section 5 of the Employers' Liability Act of 1908, as applicable to the District of Columbia, is constitutional; and
> "2. The contention that the act does not embrace the kind of contract pleaded by appellant as a defense is clearly frivolous and made only for the purpose of delay."

Counsel for defendant in error admit (Brief, p. 3), and the record clearly shows, that it was contended by the plaintiff in error in the Supreme Court of the District of Columbia and also in the Court of Appeals that the act as a whole, including section 5 thereof, was unconstitutional, and that if constitutional, section 5, reasonably construed, was inapplicable to the relief-department contract specially pleaded in bar of the plaintiff's cause of

action. These contentions were wholly denied by both of the courts below. The amount of the judgment is sufficient of itself to give this court jurisdiction, aside from the constitutional questions involved.

The plaintiff in error has not confined or limited its objections to the constitutionality of this statute to the fifth section thereof, as intimated by counsel for the defendant in error on page 3 of their brief, but by its assignments of error here has specifically set forth and reiterated, and now insists upon all of the other grounds of invalidity heretofore urged.

The assignments of error before this court are as follows:

1. In holding that the provisions of the act of Congress approved April 22, 1908, entitled "An act relating to the liability of common carriers by railroads to their employees in certain cases," and particularly the provisions of section 5 thereof, were and are applicable to the plaintiff's cause of action as set forth in his declaration filed in the above-entitled cause, and in further holding that said provisions of said act, as and when applied to said cause of action, were and are valid in law.

2. In not holding that the provisions of said section 5 of said act of Congress approved April 22,

1908, were and are inapplicable to plaintiff's cause of action as set forth in the pleadings filed in the above-entitled cause, or if applicable thereto, then in not holding said provisions of said act of Congress to be invalid in law because opposed to the provisions of article V of the articles of amendments to the Constitution of the United States.

3. In affirming the action of the Supreme Court of the District of Columbia in sustaining the demurrer of the plaintiff to defendant's second plea, filed May 23, 1910 (printed transcript of record, pages 5-13, inclusive), and in holding that the relief benefit contract between the plaintiff and the defendant therein referred to and pleaded by way of defense to plaintiff's suit was "within the prohibition of section 5 of the act of 1908," above referred to.

(For more detailed grounds of the errors in law so generally assigned, see printed transcript of record herein, at pages 99 and 100, as reproduced below).

4. In affirming the judgment of the Supreme Court of the District of Columbia.

The more detailed grounds of error referred to in said third assignment of error will be found set forth in the record, as follows:

"2. If said act is applicable to this case, that the act is unconstitutional and void for the following, among other reasons:

"*a*. That it is a statute governing liabilities of master and servant, not a statute regulating commerce, and that it does not apply generally to all masters in the District of Columbia and elsewhere, but singles out one class, to wit, common carriers by railroad.

"*b*. That it does not apply generally to all common carriers, but simply strikes at one class of them, to wit, common carriers by railroad, thereby denying to them the equal protection of the law.

"*c*. The act fails to distinguish between employees sustaining injury or suffering death while in the performance of their duties for the carrier, and employees not so engaged, or who may be performing work for their own personal profit or convenience, or who may be upon their own conveyances at the time of the injury.

"*d*. Because it impairs the obligations of contracts, and denies to the carrier and employee freedom of contract.

"*e*. Because it denies to common carriers a fair and impartial trial by a jury, as known to the common law.

"*f*. Because it is a denial to the carrier of due process of law.

"*g*. Because it will result in the taking of their property without just compensation" (99 and 100).

A Question of Practice Involved.

Paragraph 5 of rule 6 of the Rules of Practice of this court as amended and promulgated October 23, 1911, authorizes the submission of a motion to affirm in but two classes or conditions of pending cases, viz:

> 1. Those in which it is manifest that the writ of error or appeal was taken for delay only.
>
> 2. Those in which the questions on which decision of the cause must depend are so frivolous as not to need *further* (italics ours) argument.

That the rule does not contemplate the summary affirmance of disputed judgments in cases wherein the appeal or writ of error presents for decision pertinent questions of constitutional or statutory law not previously argued before this court and plainly or conclusively foreclosed by its prior decision, would seem to be too plain for extended discussion. No matter how simple any pertinent question of statutory construction, or applicability, or of constitutional law may appear to be to the doughty practitioner, it is not well to be over-persuaded, and until this court has formally spoken on the subject it cannot confidently be alleged that the question presented is "so frivolous as not to need *further* argument," or that the writ

of error which brings any such pertinent question up for review, was sued out merely for delay.

The pending motion concedes (p. 3) that in the Court of Appeals at least two questions were urged by plaintiff in error here in its endeavor to secure a reversal of the judgment of the trial court, viz:

> "1. That the Employers' Liability Law Act of April 22, 1908, under which the suit was maintained, is unconstitutional; and
> "2. That if the Employers' Liability Law is constitutional, it has no application to the relief benefit contract pleaded as a release in this case."

Unless each of these questions has heretofore been determined by this court adversely to plaintiff in error's contentions in regard thereto, not to speak of its contentions upon various other questions of law which are supposed to be open for discussion upon this writ of error, it would seem that the pending motion should be denied, or that at the worst, the cause itself should be ordered to the summary docket for early argument, a result we would heartily welcome.

That the question as to the constitutionality of the Employers' Liability Law of 1908 in general, has not heretofore been publically decided by the court, is evidenced by the fact that cases involving such question were argued at length and submitted to the court at the October, 1910, term and are still held by it under advisement and presumably undetermined. If the law in its general aspects should

be upheld as constitutional it is plain that the specific question as to the constitutionality of the five sections thereof, as applied to a pre-existing voluntary contract not made or entered into with any purpose or intent to enable plaintiff in error "to exempt itself from any liability created by this (said) act," would still be open for argument, for so far as known to us, no case necessarily involving such question has ever been submitted to the court for decision.

Section 3 of the Employers' Liability Act of 1906 differs from the provisions of section 5 of the act of 1908, not only substantially, but vitally.

The Employers' Liability cases, 207 U. S., 463, and the cases of El Paso, &c., Co. *vs.* Gutierrez, 215 U. S., 87, and McNamara *vs.* Washington Terminal Co., 35 App. D. C., 230, cited and relied upon by counsel for defendant in error, if pertinent in any aspect to the pending cause, cannot be said to have foreclosed it, for each of those cases involved provisions of the law of 1906 only, while the pending cause has concern solely with the act of 1908.

Nor is the case foreclosed by C., B. & Q. R. Co. *vs.* McGuire, 219 U. S., 549, for there the reserved and plenary power of a State determined the judgment, while here the applicability in the circumstances of the delegated and restricted power of the Federal Government is a disputed matter, possibly not easily to be solved and at any rate meriting oral argument as well as mental consideration.

The provisions of the Iowa statute involved in the McGuire case differs from section 5 of the Employers' Liability Act of 1908 quite as seriously if not more so than it differs from section 3 of the Employers' Liability Act of 1906, and the specified sections of the two latter acts differ from each other quite as materially and vitally as each differs from the Iowa statute.

For purposes of greater clearness these suggestions are reiterated in different form and greater detail below.

The Act of April 22, 1908, is Unconstitutional.

Counsel for the defendant in error assert that the constitutionality of the Employers' Liability Act of 1908, and especially section 5 thereof, relating to relief-benefit contracts, has been "set at rest" by the decisions of this court in the following cases:

Employers' Liability Cases, 207 U. S., 463.
El Paso, etc., R. R. Co. *vs.* Gutierrez, 215 U. S., 87.
C., B. & Q. Ry. Co. *vs.* McGuire, 219 U. S., 549.

In the original Employers' Liability Cases (207 U. S., 463), this court passed upon the validity of the Employers' Liability Act approved June 11, 1906, and not the act of 1908, and it was there held that the former statute was unconstitutional be-

cause it embraced subjects within the authority of Congress to regulate commerce and subjects not within the constitutional powers of that body, and so blended matters relating to interstate and intrastate commerce that they were incapable of separation (Opinion, 504). The constitutionality of the contract section of the act of 1906 was not considered or decided, although the possible unconstitutionality of that section is pointed out by Mr. Justice Moody in his dissenting opinion, wherein he says:

> "The fourth change, that forbidding the employee to make a contract releasing his employer from the consequences of his negligence, is open to a possible objection not common to the others. It is asserted that this part of the act violates the right of free contract, which in some cases this court has protected against the exercise of the legislative power. Without intimating any opinion on that subject, it is enough to say that that part of the statute is separable from and independent of the remainder and may stand or fall by itself and that *no question concerning it is raised in these cases*" (540).

In *El Paso, etc., R. R. Co. vs. Gutierrez, supra,* the general scheme of the Employers' Liability Act of 1906 was held to be a constitutional exercise of the plenary powers of Congress over the Territories of the United States and the District of Columbia. Mr. Justice Day, in delivering the opin-

ion of the court, said: "We are concerned in the present case with its first section only" (Opinion, 95). Nothing more was before the court for consideration or decision, and the specific constitutional objections here made to the act of 1908 were not raised or considered.

In the *McGuire* case, *supra,* as stated by Mr. Justice Hughes, the question presented was "with respect to the validity of section 2071 of the Code of Iowa as amended in the year 1898, which was held to preclude the railroad company from making the defense that recovery was barred by the acceptance of benefits under a contract of membership in its relief department" (Opinion, 560), and the decision of the court was confined to the power of the State legislature to pass such a statute, concerning which power this court said:

> "Whether the policy declared by the statute in question is approved or disapproved, it cannot be said that the legislative power has been exceeded either in defining the liability or in the means taken to prevent the legislative will, with respect to it, from being thwarted" (Opinion, 573).

If section 5 of the Federal Employers' Liability Act of 1908 relating to relief department contracts and this amendment to the Iowa Code reviewed in the McGuire case were in all respects identical, the principles announced in that case would be a persuasive argument by way of analogy for the exist-

ence of power in the Congress of the United States as the local legislature of the District of Columbia to pass a similar statute for the District and the Territories, but in view of the material differences in the language of the contract sections of the two statutes, which will hereafter be pointed out, it is difficult to perceive how the McGuire case can be regarded as an authoritative disposition of the propositions underlying the writ of error in the case at bar.

In the group of cases involving the constitutionality and validity of provisions of the Employers' Liability Act of 1908, other than section 5, relating to relief department contracts, which were argued and submitted at the last term (Nos. 387, 558, and 559, October term, 1910), many of the grounds of objection to this act relied upon in the case at bar were urged and argued, but until these questions have been finally decided, either in those cases or in this, there would seem to be no substantial ground for the suggestion that the questions here presented have been "set at rest," as the Court of Appeals held and counsel for the defendant in error contend.

Mr. Justice Day, in his opinion in the Gutierrez case, pointed out that the validity of the act of 1906, in so far as it concerned the District of Columbia and the Territories, was not dependent upon the power of Congress under the commerce

clause of the Constitution, but upon its plenary power over said District and the Territories, which "give it an undoubted right to pass a controlling law *and to make regulations governing the subject*" (Opinion, 97). One of the principal grounds of error insisted upon in this case is that the act of 1908 "is a statute governing the liability of master and servant, not a statute regulating commerce, and that it does not apply generally to all masters in the District of Columbia and elsewhere, but singles out one class, to wit, common carriers by railroad"—in other words, that Congress, in the exercise of its plenary power over the District of Columbia, has not made a uniform law operating upon all masters alike, but has discriminated against one class of employers, namely, those having the misfortune to be engaged in the business of transportation.

II.

The act of 1908 is not applicable to the relief department contract pleaded in this case.

Counsel for the defendant in error assert that "the contention that the act does not embrace the kind of contract pleaded by appellant as a defense is clearly frivolous and made only for the purpose of delay," and yet they devote but two pages of the brief filed in support of their motion to a discussion of the constitutional point and the re-

mainder of their brief, eight pages, to the consideration of this "frivolous" proposition.

The arguments contained in those eight pages are more or less novel in form, involve in their premises definitions which may well be disputed, and deductions from decided cases about which reasonable minds and men may readily differ.

The correlated sections of the Employers' Liability Acts of 1906 and 1908 bearing upon this discussion, for purposes of convenience are set forth in parallel columns.

Act of 1906.

SEC. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover ramages for personal injuries to or death of such employee: *Provided, however,* That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

Act of 1908.

SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, or relief benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which said action was brought.

It will be observed that the act of 1906 is aimed at the *contract*, and says that neither the contract—no matter what its purpose or intent may be or how limited its scope—nor any *acceptance of benefits thereunder* shall be a bar or defense. But when Congress again had this matter before it the criticisms of the former statute and the effect of that statute upon perfectly innocent contracts caused an awakening and Congress was brought to realize that all relief department contracts were not objectionable; that most of them were beneficial to the men, by furnishing to those engaged in the hazardous business of railroading a cheap and secure form of life, accident, and disability insurance, which they could not obtain otherwise except by paying almost prohibitive rates to the companies engaged in such business. So that section 3 of the act of 1906 was repealed, modified in many essential particulars, and re-enacted as section 5 of the subsequent act of 1908.

In the act of 1908 Congress indicates as plainly as language can express it an intention to strike down *not all* relief department contracts, *but only* two classes thereof, namely, those contracts, rules, regulations or devices the purpose or intent of which is to *exempt* the carrier—not merely restrict, limit or modify the carrier's common-law duties and obligations,—and those contracts of exemption the purpose or intent of which is to enable the carrier to evade *any liability created by*

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that statute. Contracts of exemption from liability, if the liability arises otherwise than as a result of *this* act, do not come within its prohibition.

Among the liabilities created by *this act* is the liability of the master for injuries caused to an employee by one of his fellow-servants. The Employers' Liability Act does not simply remove an obstacle to a suit by the servant against the master when he has received injuries at the hands of a co-servant, but effects a radical change in the existing law of master and servant and creates a new duty and erects a new obligation of the master. It cannot be contended, therefore, that at the time this contract was made, viz: in October, 1905, nearly three years prior both to the passage of the act of April, 1908, and the date of the accident in May, 1908, there was or could have been any *purpose* or *intention to exempt* the master from or to evade the obligations created by an act which had not then come in existence, even if the contract itself could be construed or held to be one of exemption.

The contract here involved, however, is not of such character. *It is not a contract of employment,* such as the Supreme Court of the United States passed upon and held valid in the Voigt case (176 U. S., 489), where, as a prerequisite to employment by an express company, the applicant was compelled to sign an agreement releasing his own employer and waiv-

ing in addition his legal right to sue any railroad company over whose lines his employer operated, for injuries sustained while in the express company's service. This contract does not attempt to *exempt* the carrier from liability created by the act of 1908 or to absolve it from any obligation to its employees cast upon it by any other law. It simply provides for an election or option on the part of the injured employee after injury and his right to benefits has accrued. After injury he may either accept the benefits under his contract, which are certain and within his grasp, and by so doing release the company, or he may waive his right to such benefits and take the chances of litigation by instituting an action for damages. The employee is given the utmost freedom of action—he is not compelled to enter into the contract in the beginning as a condition of his employment, and after injury his course of conduct is wholly unrestrained, excepting that he is not allowed to violate his contract with the company and his fellow-members of the relief fund by taking his share in such fund, and thereby depleting it, and at the same time preserve for future prosecution his claim for compensation under the general law.

The distinction between contracts of the character involved in this case and those which have heretofore come under the ban of the courts is clearly drawn in the case of Johnson *vs.* Philadelphia &

Reading R. R. Co. (163 Pa. St., 127), where the court said:

> "The substantial feature of the contract which distinguishes it from those held void as against public policy is that the party retains whatever right of action he may have until after knowledge of all the facts and an opportunity to make his choice between the sure benefits of the association or the chances of litigation. Having accepted the former, he cannot justly ask the latter in addition."

And in the Atlantic Coast Line Railroad *vs.* Dunning (166 Fed., 850), in which the late Chief Justice Fuller sat as a member of the Court of Appeals of the Fourth Circuit, Mr. Justice Morris concisely summed up the law and decisions relating to such contracts for relief benefits in the following language:

> "By a great number of carefully considered adjudications of the courts, both State and Federal, contracts of this character have been upheld, and determined not to be against a sound public policy, and distinctly beneficial to the employee as well as wise on the part of the employer."

This same court, in the later case of Day *vs.* Atlantic Coast Line R. R. Co. (179 Fed., 26), in reaffirming its decision in the Dunning case, says:

> "The basis upon which all of the decisions rest is that, by becoming a member of the

relief department, the employee does not waive, or contract against, liability for damages for an injury sustained by the negligence of the employer. That, after sustaining the injury, he is free to maintain an action for damages without regard to his being a member of the department. That he is entitled to the benefits secured by membership without regard to negligence or legal liability of the employer. *That when he elects to take such benefits he releases, and not until then, the employer from other or further liability.* With an evident and frequently expressed determination to strictly construe all contracts made by employees of public service corporations, or those in whose service the employment involves unusual hazards, waiving any rights, *the courts have, with practical uniformity, and by the same process of reasoning, upheld this plan or scheme, adopted by railroad companies, and, so far as we are informed, concurred in by their employees.*"

It is apparent from the foregoing and many other cases that might be cited that at the time the contract in this case was entered into, in October, 1905, and when the Employers' Liability Act of 1908 was passed, relief department contracts like the one pleaded in this case, by the uniform trend of decision in the Federal and State courts of this country, had been held (*a*) not to be against public policy, and (*b*) not to be contracts *exempting* the employer from responsibility for his negligence.

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The act of 1908, creating, as it expressly does, new liabilities on the part of the master, might be nullified if employers were permitted to exact from their employees at the time they entered their service a contract exempting them from responsibility for the obligations created by the statute, and to prevent this and render the statute effective it was necessary to legislate against any such attempts on the part of employers. It was never intended, however, to strike down agreements which the employee was under no compulsion to execute, but which he entered into voluntarily and without solicitation, and which did not exempt the employer, but gave to the employee a right of election, after injury and after opportunity to consider his rights and consult with counsel, to take the certain benefits provided by his contract or the uncertain remedies accorded him by the general law.

If it had been the intention of Congress to strike down all relief department contracts, whether made prior or subsequent to the passage of the law, is it not reasonable to suppose that the language employed would have been "any contract the *effect* of which, etc.," instead of the words "purpose or intent," which refer to the meaning in the minds of the parties at the inception of the contract.

Courts uniformly refuse to give to a statute a retrospective operation whereby existing contracts

or rights previously vested are injuriously affected unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature.

Chew Heong *vs.* U. S., 112 U. S., 536.
Twenty per cent Cases, 20 Wall., 179.

Counsel cites the case of McNamara *vs.* Washington Terminal Company *et al.* (35 App. D. C., 230), and assert that the relief department contract pleaded in that case "was in all respects similar to the contract in the case at bar." A comparison of that case with this brings out clearly the essential differences between the two types of relief department contract used by railroad companies. The contract reviewed in the McNamara case was *compulsory,* and not *voluntary* as in this case, the regulations governing the relief department of the Baltimore & Ohio Railroad Company providing that "all persons employed in the service on the first day of April, 1889, with the exceptions noted above, and all persons thereafter entering the service or promoted therein *must, as a condition of employment or advancement*, become full members of this feature [the relief feature], entitled to all its benefits, before being permitted to go on duty." (See Hearings of Committee on the Judiciary on the Employers' Liability Bill of 1908, pp. 195, 196).

But the form of contract of the Pennsylvania Railroad Voluntary Relief Department, adopted

by the defendant, pleaded in this case, not only shows upon its face and in the regulations forming part thereof that it is wholly *voluntary,* but the facts alleged in the plea and admitted by the demurrer are that of the 8,458 employees of the defendant in 1908 only 6,909 were members of its relief department. Doubtless the majority of its employees on entering the hazardous business of railroading did as the plaintiff in this case was careful to do—become members of the relief fund when they entered the service of the company. But they were not compelled to do so, and the contracts made by them with the relief department on entering the service of the railroad company cannot from that fact alone be taken to be contracts of employment with the railroad company.

Another distinction between the McNamara case and this is that there the court was not only passing upon a *different contract,* entered into subsequent to the passage of the law, but was construing a *dissimilar statute*—the act of 1906, which declared void the *contract* as well as the *acceptance of benefits* thereunder. But, as we have endeavored to make clear, the act of 1908 contains no such sweeping provisions, and being a statute in derogation of common-law rights it cannot be given any broader or different meaning than its language naturally implies.

> "It is not presumed that the legislature intended to make any innovation upon the

> common law further than the necessity of the case required. In other words, statutes in derogation of it, and especially of a common-law right, are strictly construed, and will not be extended by construction beyond their natural meaning."
>
> Sutherland on Statutory Construction, sec. 290.

In the *McGuire* case, *supra*, the amendment to the Code of Iowa, which was reviewed by this court, was almost identical in language with the contract section of the act of 1906. It was as follows:

> "Nor shall any contract of insurance relief, benefit or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation or any other person or association acting for such corporation, nor shall the acceptance of any such relief, insurance, benefit or indemnity by the person injured, his widow, heirs or legal representatives after the injury, from such corporation, person or association, constitute any bar or defense to any cause of action brought under the provisions of this section; but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to the injuries received" (Opinion, 560).

The Iowa statute like the act of 1906 struck down the contract as well as the acceptance of benefits thereunder, was not limited and restricted in its terms like the contract section of the act of

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1908 here under consideration, and for that reason cannot be regarded as authoritative in the interpretation of the act of 1908.

III.

If the Employers' Liability Act, approved April 22, 1908, should be held to be either unconstitutional or inapplicable, it would necessarily follow that the judgment below could not be affirmed, because the evidence conclusively established that the injury sustained by the plaintiff below resulted solely from the carelessness of a fellow-servant, for whose negligence the defendant would not be responsible in the absence of this statute.

It is respectfully suggested, therefore, that the motion to affirm should be denied.

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